No. 16-1144	
Title:	**Carl J. Marinello, II, Petitioner** **v.** **United States**
Docketed:	March 22, 2017
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Numbers:	(15-2224)
Decision Date:	October 14, 2016
Rehearing Denied:	February 15, 2017
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Mar 21 2017	Petition for a writ of certiorari filed. (Response due April 21, 2017)
Apr 12 2017	Order extending time to file response to petition to and including May 22, 2017.
Apr 21 2017	Brief amicus curiae of The American College of Tax Counsel filed.
Apr 21 2017	Brief amici curiae of Cause of Action Institute, at el. filed.
May 22 2017	Brief of respondent United States in opposition filed.
May 25 2017	Letter of May 25, 2017, with supplemental authority from the Acting Solicitor General received.
Jun 05 2017	Reply of petitioner Carl J. Marinello, II filed.
Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 26 2017	DISTRIBUTED for Conference of June 26, 2017.
Jun 27 2017	Petition GRANTED.
Aug 03 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 1, 2017.

Aug 03 2017	The time to file respondent's brief on the merits is extended to and including October 23, 2017.
Aug 23 2017	Motion to dispense with printing the joint appendix filed by petitioner Carl J. Marinello, II.
Sep 01 2017	Brief of petitioner Carl J. Marinello, II filed.
Sep 08 2017	Brief amicus curiae of American College of Tax Counsel filed.
Sep 08 2017	Brief amicus curiae of New York Council of Defense Lawyers filed.
Sep 08 2017	Brief amici curiae of Cause of Action Institute and National Association of Criminal Defense Lawyers filed.
Sep 08 2017	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Sep 25 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 06 2017	SET FOR ARGUMENT ON Tuesday, December 5, 2017
Oct 18 2017	Record requested from the U.S.C.A. 2nd Circuit.
Oct 19 2017	Record received from the U.S.C.A. is electronic.
Oct 20 2017	CIRCULATED
Oct 23 2017	Brief of respondent United States filed. (Distributed)
Nov 15 2017	This case is removed from the oral argument calendar for Tuesday, December 5, 2017, and has been SET FOR ARGUMENT ON Wednesday, December 6, 2017.
Nov 22 2017	Reply of petitioner Carl J. Marinello, II filed. (Distributed) **Main Document** **Certificate of Word Count**
Dec 06 2017	Argued. For petitioner: Matthew S. Hellman, Washington, D. C. For respondent: Robert A. Parker, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Matthew S. Hellman Counsel of Record	Jenner & Block LLP 1099 New York Ave., NW Suite 900 Washington, DC 20001 mhellman@jenner.com	(202)-639-6000
Party name: Carl J. Marinello, II		
Joseph M. LaTona	403 Main Street 716 Brisbane Building Buffalo, NY 14203 sandyw@tomburton.com	(716) 842-0416
Party name: Carl J. Marinello, II		
Attorneys for Respondent		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: United States		
Other		
Jenny Louise Johnson Counsel of Record	Johnson Moore LLC 150 North Wacker Drive - Suite 1250 Chicago, IL 60606 jenny.johnson@jmtaxlitigation.com	312-549-9990
Party name: American College of Tax Counsel		
Lewis Jeffrey Liman Counsel of Record	Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, NY 10006 lliman@cgsh.com	212-225-2000
Party name: Chamber of Commerce of the United States of America, et al.		
Erica Lynn Marshall Counsel of Record	Cause of Action Institute 1875 Eye Street N.W. Washington, DC 20006 erica.marshall@causeofaction.org	202 499-4232
Party name: Cause of Action Institute and National Association of Criminal Defense Lawyers		
Alexandra Anastasia Ekaterina Shapiro	Shapiro Arato LLP	212-257-4880

Counsel of Record

500 Fifth Avenue
40th Floor
New York, NY 10110

ashapiro@shapiroarato.com

Party name: New York Council of Defense Lawyers

John J. Vecchione

Cause of Action Institute
1875 Eye Street, N.W.
Washington, DC 20006

(202) 499-4232

john.vecchione@causeofaction.org

Party name: Cause of Action Institute, at el.

RECORD AND BRIEFS

16-1144

No. ____

FILED
MAR 21 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH M. LATONA
Counsel of Record
403 Main Street
716 Brisbane Building
Buffalo, NY 14203
(716) 842-0416
sandyw@tomburton.com

MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY
EMMA P. SIMSON
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

QUESTION PRESENTED

Section 7212(a) of the Internal Revenue Code includes the following provision:

> Whoever corruptly or by force ... endeavors to intimidate or impede any officer ... of the United States acting in an official capacity under this title, *or in any other way corruptly or by force ... endeavors to obstruct or impede[] the due administration of this title,* shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both ....

26 U.S.C. § 7212(a) (emphasis added).

The question presented is whether § 7212(a)'s residual clause, italicized above, requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR CERTIORARI 1

PARTIES TO THE PROCEEDING 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

A. Factual Background And Proceedings In The District Court. 6

B. Proceedings In The Second Circuit. 8

REASONS FOR GRANTING THE WRIT 11

I. This Case Presents A Perfect Vehicle To Resolve The Circuit Split On The Proper Interpretation Of Section 7212(a). 11

II. The Question Presented Is Important. 14

III. The Decision Below Was Wrongly Decided 16

CONCLUSION 21

Appendix A

United States v. Marinello, 839 F.3d 209 (2d Cir. 2016) 1a

Appendix B

Denial of Rehearing *En Banc* and Dissent from Denial, *United States v. Marinello*, No. 15-2224, __ F.3d __, 2017 WL 640078 (2d Cir. Feb. 15, 2017) 40a

Appendix C

Order Denying Motion For Acquittal, *United States v. Marinello*, No. 12-CR-53S (W.D.N.Y. June 26, 2015) 51a

TABLE OF AUTHORITIES

CASES

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) 16, 17

Boulware v. United States, 552 U.S. 421 (2008) 15

Dowling v. United States, 473 U.S. 207 (1985) 16

Pettibone v. United States, 148 U.S. 197 (1893) 16

Skilling v. United States, 561 U.S. 358 (2010) 16

United States v. Aguilar, 515 U.S. 593 (1995) 3, 5, 17, 20

United States v. Floyd, 740 F.3d 22 (1st Cir. 2014) 12

United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998) 8, 11, 19

United States v. Massey, 419 F.3d 1008 (9th Cir. 2005) 12

United States v. Miner, 774 F.3d 336 (6th Cir. 2014) 11, 12, 13

United States v. Sorensen, 801 F.3d 1217 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1163 (2016) 12

Whitman v. American Trucking Ass'n, 531 U.S. 457 (2001) 19

Yates v. United States, 135 S. Ct. 1074 (2015) 15, 17

STATUTES

18 U.S.C. § 1503(a) 9, 11, 17

26 U.S.C. § 7201 15

26 U.S.C. § 7203 15

26 U.S.C. § 7206 15

26 U.S.C. § 7212(a) ..... *passim*

28 U.S.C. § 1254(1) 1

Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, 238 18

Internal Revenue Code of 1939, ch. 34, § 3601(c), 53 Stat. 435, 436 18

LEGISLATIVE MATERIALS

H.R. Rep. No. 83-1337 (1954), *reprinted in* 1 Internal Revenue Acts of the United States: The Revenue Act of 1954 with Legislative Histories and Congressional Documents (Bernard D. Reams Jr. ed. 1982) 19

PETITION FOR CERTIORARI

Carlo J. Marinello, II, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the caption.

OPINIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a-39a) is reported at 839 F.3d 209. The order denying rehearing *en banc* and the dissent from denial of *en banc* review (Pet. App. 40a-50a) is unreported but is available at 2017 WL 640078. The trial court's order (Pet. App. 51a-57a) denying Petitioner's motion for acquittal is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on October 14, 2016. A timely petition for rehearing *en banc* was denied on February 15, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7212(a) of Title 26 provides:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both.

INTRODUCTION

This case presents an important and recurring question of criminal tax liability that has divided the courts of appeals. Section 7212(a) of the Internal Revenue Code makes it a felony to "corruptly or by force ... intimidate or impede any officer or employee of the United States acting in an official capacity under this title, *or in any other way corruptly or by force ... obstruct[] or impede[] ... due administration of this title*." 26 U.S.C. § 7212(a) (emphasis added).

The Sixth Circuit, relying on this Court's interpretation of a nearly identical obstruction statute in *United States v. Aguilar*, 515 U.S. 593 (1995), has interpreted § 7212(a)'s "residual clause," italicized in the paragraph above, to require that the government prove a defendant obstructed a pending Internal Revenue Service (IRS) action or proceeding, such as an investigation or audit, of which the defendant was aware.

In the decision below, the Second Circuit expressly rejected the Sixth Circuit's interpretation and instead joined three other circuits in finding that a defendant may be guilty of obstructing the administration of the tax code even if the defendant has no knowledge of a pending IRS action or proceeding—indeed, even if there is no pending IRS action or proceeding.

It is difficult to overstate the sweep of that interpretation, which unmoors the obstruction statute from any particular IRS investigation and elevates it into a general prohibition on conduct that hinders the IRS in any way. Under the Second Circuit's

construction, any action that could make the IRS's ability to assess and collect taxes more difficult—say throwing away an old business receipt or asking for a tip in cash—could be the basis of a felony obstruction charge if alleged by a prosecutor to be "corrupt." Indeed, this interpretation of § 7212(a)'s residual clause is so broad that it swallows up other tax crimes. It is difficult, for example, to conceive of any act of tax *evasion* or tax *fraud* that could not also be charged as tax *obstruction* on the Second Circuit's reading.

In a sharply worded dissent from the denial of *en banc* review, Judges Jacobs and Cabranes warned, "[i]f this is the law, nobody is safe." Pet. App. 42a. Concerned that the panel opinion "affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed," the dissenters explained that the "line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern," and that the panel's interpretation "serves only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted." Pet. App. 45a-46a. According to the dissent, the panel had misconstrued the statute as "a prosecutor's hammer that can be brought down upon any citizen," rather than as a "specialized tool" to prevent obstruction of "active IRS investigations." Pet. App. 46a.

This Court's review is warranted to determine the scope of § 7212(a). There is an acknowledged split, with the Sixth Circuit's interpretation standing against decisions from the First, Second, Ninth, and Tenth Circuits. This case is an ideal vehicle to resolve that split

because the issue is squarely presented and dispositive of Petitioner's conviction under § 7212(a). The question is also one of great significance. Everyone is subject to the tax code, and this Court should decide whether Congress intended § 7212(a) to upend the structure of the Code's criminal tax provisions and bestow such broad powers on prosecutors.

Finally, review is warranted because the decision below is incorrect. The text, structure, and purpose of § 7212(a)'s residual provision are analogous to residual or "omnibus" provisions of other obstruction statutes, which this Court has repeatedly cabined. In so doing, the Court has recognized the need to "exercise[] restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Aguilar*, 515 U.S. at 600 (citation omitted) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). And it has held that it will not interpret such provisions so broadly as to reach any and all conduct that a prosecutor might call "corrupt."

Petitioner respectfully requests that this Court grant review.

STATEMENT OF THE CASE

A. Factual Background And Proceedings In The District Court.

Petitioner Carlo J. Marinello, II, owned and operated a freight service business in western New York that couriered items between the United States and Canada. Pet. App. 2a. Marinello did not maintain business records or file corporate or personal income tax returns from approximately 1992 through 2010. Pet. App. 2a. In 2004, the IRS investigated Marinello for tax evasion on the basis of an anonymous tip. Pet. App. 4a. The IRS subsequently closed that investigation because it could not determine whether any unreported income was significant. Pet. App. 4a. Marinello had no knowledge of that investigation. Pet. App. 4a.

In 2009, the IRS reopened its investigation. On June 1, 2009, IRS agents interviewed Marinello at his home. Pet. App. 5a. During that interview, he admitted that he had failed to file tax returns, used business income to pay for personal expenses, and destroyed bank statements and business records. Pet. App. 5a. In 2012, following the investigation, a superseding indictment filed in the United States District Court for the Western District of New York charged Marinello with nine counts of tax-related offenses for conduct that he engaged in prior to learning of any IRS investigation. Pet. App. 6a.

Specifically, eight of those counts charged Marinello with misdemeanors under 26 U.S.C. § 7203 for willfully failing to file personal income and corporate tax returns for the years 2005 through 2008. Pet. App. 6a. The

remaining count charged Marinello with violating 26 U.S.C. § 7212(a)'s residual clause.

In support of that charge, the superseding indictment alleged that Marinello had from approximately January 2005 until approximately April 15, 2009: (1) failed to maintain corporate books and records; (2) failed to provide his accountant with complete and accurate information related to his personal income and the income of his business; (3) destroyed, shredded, and discarded business records; (4) cashed business checks received for services rendered; (5) hid business income in personal accounts; (6) transferred assets to a nominee; (7) paid employees with cash; and (8) used business receipts and funds from business accounts to pay personal expenses. Pet. App. 6a-7a.

Marinello ultimately went to trial in 2014. Over his objection, the district court instructed the jury that proof beyond a reasonable doubt of any one of the eight obstructive acts alleged in the indictment—including omissions—would be sufficient to find Marinello guilty under § 7212(a), and that the jury need not agree on which of the eight acts had been proved. Pet. App. 9a.

The jury convicted Marinello on all counts. The district court sentenced Marinello to thirty-six months' imprisonment for violating § 7212(a), twelve months' imprisonment for each of the remaining eight misdemeanor counts—all sentences to be served concurrently—and one year of supervised release. Pet. App. 15a; *see also* Amended Judgment, *United States v. Marinello*, No. 1:12-cr-00053-WMS-HBS-1 (W.D.N.Y. July 16, 2015), ECF No. 130. The court also ordered

Marinello to pay $351,763.08 to the IRS in restitution. Pet. App. 15a.

Marinello moved for a judgment of acquittal or new trial under Federal Rules of Criminal Procedure 29 and 33 on the ground, *inter alia*, that the phrase "the due administration of this title" in section 7212(a) refers exclusively to pending IRS investigations, and that a defendant may be convicted under the statute only if he knowingly interferes with such an investigation. Pet. App. 10a. The trial court denied that motion and held "[k]nowledge of a pending [IRS] investigation is not an essential element of the crime." Pet. App. 51a-57a.

B. Proceedings In The Second Circuit.

Marinello timely appealed. As relevant here, he challenged his conviction under § 7212(a) on the ground that guilt under the residual clause requires knowledge of a pending IRS action or investigation—a fact the government had not proved. Pet. App. 15a. He urged the Second Circuit to adopt the Sixth Circuit's interpretation of § 7212(a), which held, in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), that the statute's reference to "due administration of the Title requires some pending IRS action"—such as a subpoena or audit—"of which the defendant was aware." *Id.* at 957 & n.2.

The Second Circuit rejected the Sixth Circuit's interpretation. It held that the statute covers any corrupt act or omission that obstructs or impedes any activity under the tax code. Pet. App. 25a-26a. In so holding, the court acknowledged that in *United States v. Aguilar* this Court had previously held that a nearly

identical provision prohibiting corrupt efforts to obstruct or impede "the due administration of justice," 18 U.S.C. § 1503(a), *did* require a defendant to know that his actions would affect judicial or grand jury proceedings. Pet. App. 20a-21a (discussing *Aguilar*, 515 U.S. 593). The Second Circuit distinguished *Aguilar*, however, on the ground that § 7212(a) prohibits interfering with the "due administration of this title [*i.e.*, the Internal Revenue Code]" rather than the "due administration of justice." Pet. App. 24a. According to the Second Circuit, that "difference indicates that the statutes carry different meanings," Pet. App. 24a-25a, and that § 7212(a) "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities," Pet. App. 24a-25a (emphasis in original) (quoting *United States v. Willner*, No. 07 Cr. 183(GEL), 2007 WL 2963711, at *5 (S.D.N.Y. Oct. 11, 2007)).

The Second Circuit acknowledged the Sixth Circuit's concern that such a reading would expose a defendant to felony charges for "conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." Pet. App. 22a (quoting *Kassouf*, 144 F.3d at 957). But it held that concerns about the sweep of the statute were unwarranted because the statute required the defendant to have acted "corruptly." Pet. App. 27a.

Marinello sought rehearing *en banc*, which was denied over a sharp dissent authored by Judge Jacobs and joined by Judge Cabranes. The dissent warned that by rejecting the Sixth Circuit's interpretation, the panel had "cleared a garden path for prosecutorial abuse."

Pet. App. 41a. It argued that there was no material difference between § 7212(a) and the residual clause at issue in *Aguilar*, and that the panel failed to recognize that this Court has repeatedly cast a "cold eye on broad residual criminal statutes (particularly omnibus clauses like the one here)" in cases like *Aguilar*. Pet App. 43a-46a. Judge Jacobs further rejected the panel's contention that the statute's "corrupt" mens rea requirement provided adequate protection, given that corruption could easily be charged by an aggressive prosecutor and "the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Pet. App. 45a. The dissent concluded that the panel's decision threatened a regime where a prosecutor could say "Show me the man, and I'll find you the crime." Pet. App. 49a.

Marinello timely petitioned for review from this Court on March 21, 2017.

REASONS FOR GRANTING THE WRIT

I. This Case Presents A Perfect Vehicle To Resolve The Circuit Split On The Proper Interpretation Of Section 7212(a).

The courts of appeals expressly disagree about the proper scope of § 7212(a). Had Marinello been prosecuted in Ohio rather than New York, he could not have been convicted under § 7212(a) without proof that he had obstructed some IRS action of which he was aware.

Specifically, in *United States v. Kassouf*, the Sixth Circuit held that "due administration of the Title [under § 7212(a)] requires some pending IRS action of which the defendant was aware," including, but not limited to, "subpoenas, audits or criminal tax investigations." 144 F.3d at 957 & n.2. Relying on *Aguilar*, in which this Court interpreted nearly identical language in the obstruction of justice statute, 18 U.S.C. § 1503(a), the Sixth Circuit read the omnibus clause of § 7212(a) as similarly imposing the requirement of a pending action or proceeding of which the defendant was aware. *Kassouf*, 144 F.3d at 956-57. A broader construction of § 7212(a), the Sixth Circuit reasoned, would "permit[] the IRS to impose liability for conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." *Id.* at 957.

The Sixth Circuit recently reaffirmed *Kassouf* in *United States v. Miner*, holding that "a defendant may not be convicted under the omnibus clause unless he is 'acting in response to some pending IRS action of which

[he is] aware.'" 774 F.3d 336, 345 (6th Cir. 2014) (quoting *United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004)). In doing so, the Sixth Circuit reiterated its reluctance to read § 7212(a) to punish a defendant who "may have had no idea that conduct such as the failing to maintain records (before his tax returns were ever filed) might obstruct IRS action because he had no specific knowledge that the IRS would ever investigate his activities." *Id.* at 344 (quoting *Kassouf*, 144 F.3d at 958).

Conversely, in this case, the Second Circuit expressly rejected the Sixth Circuit's construction of § 7212(a). As explained above, the Second Circuit held that the residual clause does not require the defendant have any knowledge of any IRS action he is obstructing, and instead reaches any corrupt act or omission that allegedly has the effect of obstructing or impeding any one of the "vast" array of activities that the IRS carries out, such as "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers['] submissions; as well as monitoring taxpayers' compliance with their obligations." Pet. App. 25a.

In so holding, the Second Circuit expressly embraced the decisions of three other courts of appeals that have also rejected the rule adopted by the Sixth Circuit. *United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015) (disagreeing with *Kassouf*), *cert. denied*, 136 S. Ct. 1163 (2016); *United States v. Floyd*, 740 F.3d 22, 31-32 & n.4 (1st Cir. 2014) (same); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) ("[T]he government need not prove that the defendant was aware of an ongoing

tax investigation to obtain a conviction under § 7212(a).").

The Court should resolve the circuit split in this case. Further percolation is unnecessary and further difference in interpretation is unjust. As the dialog between the majority opinion and the dissent from denial of rehearing *en banc* makes clear, the arguments on both sides of this issue have been fully aired. There is no possibility of the circuit conflict resolving itself without the Court's intervention. In *Miner*, the Sixth Circuit explicitly reaffirmed its holding in *Kassouf* despite the weight of contrary authority from other circuits. 774 F.3d at 345. The government then declined to file a petition for rehearing *en banc* (after taking an extension of time to consider the issue), and also declined to file a petition for certiorari. Accordingly, the law in the Sixth Circuit is now entrenched in favor of Petitioner's position. Only this Court can resolve the disagreement among the circuits.

Finally, this case is an excellent vehicle for resolving the reach of § 7212(a). As both the majority and the dissenters below made clear, Marinello's conviction for violating § 7212(a) rises and falls on the resolution of the question presented: if the Second Circuit had agreed with the Sixth Circuit's decision in *Kassouf*, Marinello would have prevailed. Indeed, the government acknowledged the point in its Second Circuit brief. Rather than trying to distinguish *Kassouf*, the government acknowledged that "[a] Circuit split exists as to whether the government must prove the defendant was aware of an ongoing tax investigation in order to convict under section 7212(a)," and asked the Court to

"reject the Sixth Circuit's determination" because it "conflicts with three other circuits which have issued decisions which are more consistent with the statutory language." Br. for the United States at 9, *United States v. Marinello*, No. 15-2224 (2d Cir. Dec. 14, 2015).

II. The Question Presented Is Important.

As the dissenters below explained, the question presented is one of singular importance because the Second Circuit's interpretation criminalizes a vast array of conduct that Congress almost certainly did not intend § 7212(a)'s residual provision to reach.

Under the Second Circuit's interpretation, a defendant who does not maintain records at a time when the IRS does not have a pending action against him—let alone undertaking an action of which he is aware—can nonetheless be convicted of a felony of obstructing the administration of the tax code. An aggressive prosecutor could use almost any act or omission—the failure to keep a receipt, the decision to be paid in cash, the choice to use a particular method of bookkeeping—as the basis of an obstruction charge under this interpretation. To be sure, § 7212(a) requires the defendant to have acted "corruptly," but "alleging a corrupt motive is no burden at all" and a negligent or even reasonable error on the part of a taxpayer could be recast in an indictment as an intentional one made for the sake of obtaining an unlawful gain. Pet. App. 45a. As with most criminal charges this vague, few defendants would risk going to trial on a felony count, and instead are likely to accede to some sort of plea deal.

These concerns are particularly pertinent in the tax context where corporate and individual taxpayers may be chilled from using legitimate but aggressive tax avoidance strategies for fear of being convicted on a felony obstruction charge. "The line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Pet. App. 45a.

The decision below also warrants this Court's attention because it transforms an obstruction provision into an all-purpose tax crime. Tax fraud and tax evasion are already felonies. 26 U.S.C. § 7206 (tax fraud); 26 U.S.C. § 7201 (tax evasion). Yet under the Second Circuit's ruling, those crimes could in every case be charged as obstruction because they necessarily involve willful wrongful acts to reduce or eliminate the defendant's tax burden. *E.g.*, *Boulware v. United States*, 552 U.S. 421, 431 (2008) ("[T]he substantive provisions defining tax evasion and filing a false return expressly require ... willfulness"). Moreover, it is a *misdemeanor* to willfully fail to pay one's taxes. 26 U.S.C. § 7203. The Second Circuit's interpretation would transform every such misdemeanor into a felony obstruction charge.

This Court has long recognized the importance of not giving residual clauses unduly broad readings such that prosecutors can essentially decide which conduct is criminal. *See Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."

(quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985))); *Skilling v. United States*, 561 U.S. 358, 416 (2010) ("fair notice of what is prohibited" required to avoid impermissible vagueness); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) ("fair warning" concern animates restraint in interpreting criminal statutes (quotiong *McBoyle*, 283 U.S. at 27)); *Pettibone v. United States*, 148 U.S. 197, 207 (1893) (interpreting a predecessor general criminal obstruction statute as requiring knowledge of an attempted administration of justice). This Court should grant the petition in order to resolve the important question of whether Congress intended to give such unfettered discretion to prosecutors under § 7212(a).

III. The Decision Below Was Wrongly Decided.

Review is also warranted because the Second Circuit misconstrued § 7212(a) by reading it to encompass any corrupt act that in any way undermines the operation of the tax laws. Pet. App. 25a-26a.

In prior cases construing federal criminal statutes, this Court has "stressed repeatedly that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before ... choos[ing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Dowling v. United States*, 473 U.S. 207, 214 (1985) (quoting *Williams v. United States*, 458 U.S. 279, 290 (1982)). Doing so is warranted "both out of deference to the prerogatives of Congress, and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'"

Aguilar, 515 U.S. at 600 (citation omitted) (quoting *McBoyle*, 283 U.S. at 27). Applying these principles, this Court has consistently rejected the government's attempts to stretch federal criminal statutes to their broadest possible reach. *See, e.g.*, *Yates*, 135 S. Ct. at 1081-89; *Arthur Andersen*, 544 U.S. at 703-08; *Aguilar*, 515 U.S. at 600.

For example, in *Aguilar*, the statute at issue made it a crime to "corruptly" obstruct or endeavor to obstruct the "due administration of justice." 18 U.S.C. § 1503(a). The government argued that this broad language covered a false statement made to an investigator in the course of an investigation, but the Court rejected that broad interpretation. It instead construed the provision to require that the government prove that a defendant acted "with an intent to influence judicial or grand jury proceedings," and that the defendant's "corrupt" acts had a "nexus," *i.e.*, "a relationship in time, causation, or logic," to judicial proceedings. *Aguilar*, 515 U.S. at 599. As the Court explained, the statute was a "good deal less clear" than the Court "usually require[d] in order to impose criminal liability" on a class of conduct as broad as the government sought. *Id.* at 602.

This case is on all fours with *Aguilar* and this Court's long-standing interpretation of residual clauses. Indeed, § 7212(a)'s residual provision is nearly identical to the residual provision construed in that case. The proper construction of § 7212(a) required the government to prove that Marinello impeded or endeavored to impede an IRS action or proceeding of which he was aware, that is, that there was a "nexus" between his conduct and an IRS enforcement action, such as an audit.

The Second Circuit found *Aguilar* inapposite, but its bases for distinguishing the case are unpersuasive. For instance, it noted that § 1503's residual provision at issue in *Aguilar* follows a series of statutory clauses that "focus principally on grand jury or judicial proceedings." Pet. App. 23a. But § 7212(a)'s residual provision follows a clause that is expressly intended to prohibit actions targeted at *specific* IRS "officer[s] [or] employee[s]" engaged in enforcing the tax code, thus indicating that the provision contemplates obstruction of some specific enforcement activity rather than the abstract operation of the tax laws. *See* Pet. App. 47a.

The Second Circuit also stated, without much elaboration, that nothing in the history of § 7212(a) supported the Sixth Circuit's conclusion. But § 7212(a)'s history strongly indicates that Congress did not intend the sweeping construction the government seeks. The statutes from which § 7212(a) was derived punished those who "forcibly obstruct[ed] or hinder[ed]" a tax assessor or collector in the "execution of" the tax laws and those who "forcibly rescue[d]" property seized by a tax assessor or collector. *See* Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, 238; Internal Revenue Code of 1939, ch. 34, § 3601(c), 53 Stat. 435, 436.

Congress gave no indication that by incorporating a residual clause it intended to drastically expand the statute's reach to make it a felony to take any "corrupt" act—such as failing to maintain business records—that might someday, somehow interfere with the proper operation of the tax laws. Instead, the House and Senate reports that accompanied the legislation suggested only that Congress intended to broaden the statute to

encompass threats of force and "corrupt[]" acts (*e.g.*, bribery) that interfered with IRS employees' enforcement activities. *See, e.g.*, H.R. Rep. No. 83-1337, at 108 (1954), *reprinted in* 1 Internal Revenue Acts of the United States: The Revenue Act of 1954 with Legislative Histories and Congressional Documents (Bernard D. Reams Jr. ed. 1982).

Had Congress intended to reach corrupt acts that have no nexus to pending IRS enforcement activities and that exhibit no intent to obstruct specific IRS officers and employees engaged in enforcement activities, one would have expected Congress to make that clear. Congress "does not ... hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

The Second Circuit also rejected, Pet. App. 46a, the Sixth Circuit's concern that a broad reading of § 7212(a)'s omnibus provision could "open[] the statute to legitimate charges of overbreadth and vagueness." *Kassouf*, 144 F.3d at 958. In the Second Circuit's view, § 7212(a)'s *mens rea* requirement, which requires that an action be done corruptly, "sufficiently restricts the omnibus clause's reach." Pet. App. at 27a (quotation marks omitted).

But in *Aguilar*, the inclusion of the same *mens rea* requirement in § 1503 did not assuage this Court's concerns about adopting a broad reading of the statute. As the Court explained, a person who made a false statement without knowledge that it would be used in court might still "inten[d] to obstruct justice," but the statute was a "good deal less clear ... than we [have] require[d]" to impose such broad liability, untethered to

the obstruction of any particular proceeding. *Aguilar*, 515 U.S. at 602. Moreover, the "corrupt" requirement does little to rein in § 7212(a)'s scope as a practical matter. As Judge Jacobs explained, "the risk of wrongful conviction, even with a mens rea requirement, is real: the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Pet. App. 45a. "[*A*]*lleging* a corrupt motive is," also, "no burden at all." Pet. App. 45a.

In sum, the Second Circuit panel adopted an erroneous reading of the residual clause that does not make sense of its text, structure, and purpose. This Court should grant review to clarify that the clause encompasses only corrupt acts and omissions undertaken with awareness of a pending IRS action.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. LATONA
Counsel of Record
403 Main Street
716 Brisbane Building
Buffalo, NY 14203
(716) 842-0416
sandyw@tomburton.com

MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY
EMMA P. SIMSON
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

March 21, 2017

the obstruction of any particular proceeding. *Aguilar*, 515 U.S. at 602. Moreover, the "corrupt" requirement does little to rein in § 7212(a)'s scope as a practical matter. As Judge Jacobs explained, "the risk of wrongful conviction, even with a mens rea requirement, is real: the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Pet. App. 45a. "[*A*]*lleging* a corrupt motive is," also, "no burden at all." Pet. App. 45a.

In sum, the Second Circuit panel adopted an erroneous reading of the residual clause that does not make sense of its text, structure, and purpose. This Court should grant review to clarify that the clause encompasses only corrupt acts and omissions undertaken with awareness of a pending IRS action.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. LATONA
Counsel of Record
403 Main Street
716 Brisbane Building
Buffalo, NY 14203
(716) 842-0416
sandyw@tomburton.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY
EMMA P. SIMSON
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

March 21, 2017

APPENDIX

TABLE OF CONTENTS

Appendix A

United States v. Marinello, 839 F.3d 209 (2d Cir. 2016) 1a

Appendix B

Denial of Rehearing *En Banc* and Dissent from Denial, *United States v. Marinello*, No. 15-2224, __ F.3d __, 2017 WL 640078 (2d Cir. Feb. 15, 2017) 40a

Appendix C

Order Denying Motion For Acquittal, *United States v. Marinello*, No. 12-CR-53S (W.D.N.Y. June 26, 2015) 51a

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America, Appellee,

v.

Carlo J. Marinello, II, Defendant–Appellant.

Docket No. 15-2224

|

August Term, 2015

|

Argued: February 11, 2016

|

Decided: October 14, 2016

Before: Pooler and Sack, Circuit Judges, and Failla, District Judge.*

---

* Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

OPINION

Sack, Circuit Judge:

Defendant-appellant Carlo J. Marinello, II, a resident of Erie County in western New York State, owned and operated a freight service that couriered items to and from the United States and Canada. From approximately 1992 through 2010, Marinello neither kept corporate books or records nor filed personal or corporate income tax returns. Following an investigation by the Internal Revenue Service (the "IRS"), he was indicted by a grand jury sitting in the United States District Court for the Western District of New York on nine counts of tax-related offenses that allegedly occurred from 2005 through 2009. A jury found him guilty on all counts. He was sentenced to thirty-six months' imprisonment and one year of supervised release, and ordered to pay $351,763.08 to the IRS in restitution.

Under one of the counts of conviction, Marinello was charged with violating 26 U.S.C. § 7212(a). One portion of the statute imposes criminal liability on one who "corruptly or by force or threats of force ... endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title" (i.e., the Internal Revenue Code). *Id.* Another portion, often referred to as the "omnibus clause," imposes criminal liability on one who "in any other way corruptly ... obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title." *Id.* Marinello was charged with violating the omnibus clause.

On appeal, Marinello principally argues that we, like the Sixth Circuit addressing the same issue, should construe the phrase "the due administration of this title" in the omnibus clause to include only a pending IRS action of which a defendant was aware. He contends that his conviction under section 7212(a) cannot stand under this construction because the government offered no evidence at trial that he knew of a pending IRS investigation against him at the time of the actions on which the conviction was based. He also argues that a conviction under the omnibus clause cannot be premised on a defendant's omission, as it may have been in the case at bar, and that the district court committed procedural error during the sentencing proceedings.

We exercise jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and affirm Marinello's conviction and sentence.

BACKGROUND

Factual Background

In 1990, Marinello incorporated Express Courier Group/Buffalo, Inc. ("Express Courier"), a New York corporation. Express Courier maintained a freight service that couriered documents and packages between the United States and Canada. Despite owning and managing the company, Marinello maintained little documentation of his business income or expenses. He shredded or discarded most of the business's records, including bank account statements, employee work statements, gas receipts, and bills. Marinello paid his employees in cash and did not issue

them (or himself) tax documents such as familiar Form 1099s or Form W–2s. He often used Express Courier's funds for personal purposes, including mortgage payments on his residence (made indirectly through weekly cash contributions to his wife) and monthly payments to his mother's senior living center.

In December 2004, the IRS received an anonymous letter purporting to outline some of Marinello's business practices and accusing him of tax evasion. IRS Special Agent Angela Klimczak was assigned to investigate those allegations. Upon reviewing its own records, the IRS discovered that, from at least 1992 onward, Marinello failed to file personal or corporate income tax returns. Ultimately, Agent Klimczak recommended that the investigation be closed because the IRS could not at that time determine whether the unreported income was significant. Marinello had no knowledge of this investigation.

In 2005, Marinello sought the advice of counsel, whom he informed of his failure to file his tax returns. Counsel told Marinello that this failure to file was improper and referred him to an accounting firm for a consultation. Allan Wiegley, a certified public accountant at that firm, told Marinello that he needed to provide records of business receipts and expenses in order to pay corporate taxes with respect to Express Courier and its business. Marinello was unable to do so: He had destroyed or failed to keep the documents.

Marinello met with Wiegley again the following year to discuss a different matter. During the meeting, Marinello stated that he had made no progress in gathering Express Courier's business records. Wiegley

declined to enter into a contract to perform accounting services for Express Courier or Marinello because there was inadequate documentation for him to prepare a corporate tax return. Despite the advice from counsel and two meetings with Wiegley, Marinello did not begin maintaining books and records for Express Courier.

In each of the years 2005 through 2008, Express Courier had generated annual total gross receipts of between $200,718.88 and $445,184. During each of those years, Marinello took approximately $26,000 to $50,000 from Express Courier's business account and spent it in payment of his personal expenses.

The IRS re-opened its investigation of Marinello in 2009. On June 1, 2009, Agent Klimczak conducted an interview of Marinello at his home. He told her that he could not recall the last time he had filed an income tax return. He initially maintained that he did not file tax returns because he thought they were not required for persons who made less than $1,000 per year. He eventually admitted that he had earned more than that amount annually and should have paid taxes, but "never got around to it." Testimony of Angela Klimczak, August 6, 2014, Trial Transcript ("Trial Tr.") at 172 (App'x 181). He stated that he used business income (by cashing checks from Express Courier's customers and depositing a portion of them into his personal bank account) as well as his business bank account to pay for personal expenses. He confirmed that he shredded bank statements and that he did not keep track of Express Courier's income or expenses. He also remembered telling an accountant that he

shredded most of his business records. Marinello explained that he destroyed these documents because "that's what [he had] been doing all along" and that he "took the easy way out." *Id.* at 194 (App'x 203).

Procedural History

On October 16, 2012, in the United States District Court for the Western District of New York, Marinello was charged in a superseding indictment with corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212(a) (Count One), and willfully failing to file individual and corporate tax returns for calendar years 2005 through 2008, in violation of 26 U.S.C. § 7203 (Counts Two through Nine). Count One alleged that Marinello had violated section 7212(a) by, "among other thing[s]":

(1) failing to maintain corporate books and records for [Express Courier] of which the defendant was an employee, officer, owner and operator;

(2) failing to provide the defendant's accountant with complete and accurate information related to the defendant's personal income and the income of Express Courier;

(3) destroying, shredding and discarding business records of Express Courier;

(4) cashing business checks received by Express Courier for services rendered;

(5) hiding income earned by Express Courier in personal and other non-business bank accounts;

(6) transferring assets to a nominee;

(7) paying employees of Express Courier with cash; and

(8) using business receipts and money from business accounts to pay personal expenses, including the mortgage for the residence in which the defendant resided and expenses related to the defendant's mother's care at a senior living center.

Superseding Indictment, dated October 16, 2012, at 1–2 (App'x 75–76) (formatting altered).[1]

Before trial, Marinello sought an instruction that "the jury ... be unanimous on at least one of the means under which the government ... alleged [that] [he] ha[d] violated [title 26 section 7212(a)]" in order to convict him of that offense. Defendant's Requested Jury Instruction, dated September 25, 2012, at 1 (App'x 41). If any juror harbored a reasonable doubt on any one of the means alleged, the instruction required an acquittal on Count One. *Id.* The government opposed this proposal as a misstatement of the law, contending that it was not required to prove all of the means specified in Count One.

---

[1] The original indictment alleged a ninth means of corrupt obstruction under Count One: "failing to file with the [IRS] personal income tax returns and corporate tax returns for Express Courier." Indictment, dated February 14, 2012, at 2 (App'x 25). In response to Marinello's motion to strike this allegation as duplicitous of the remaining counts of the indictment, the government filed the superseding indictment, which removed it.

At a pre-trial conference, the district court (William M. Skretny, *Judge*) reserved ruling on the proposed jury instruction until trial. During that conference, Marinello's counsel represented that there was "no question [that Marinello] did not file his tax returns, corporate and personal," and that he had advised Marinello "to take a plea" to Counts Two through Nine. *See* Transcript of pre-trial conference, October 4, 2012, at 2 (App'x 60). But Marinello declined to plead guilty to Count One, a felony. App'x 60–61.

Marinello subsequently moved for submission to the jury of a special verdict form requiring the jury to indicate whether it found him guilty or not guilty regarding each of the eight means of violating section 7212(a) alleged in Count One of the superseding indictment. By text order, the district court deferred ruling on this request until trial.

At trial, defense counsel conceded that Marinello did not file his tax returns[2] but argued that Marinello could not be convicted on Count One because he lacked the requisite criminal intent under section 7212(a), inasmuch as he did not "corruptly" obstruct or impede the administration of the Internal Revenue Code.[3]

---

[2] The parties further stipulated that Marinello did not file with the IRS personal tax returns or corporate tax returns for Express Courier for tax periods 1992 through 2010. August 6, 2014 Trial Tr. at 64 (App'x 140).

[3] As to the remaining counts, Marinello argued that he was not guilty because the government could not prove he "willfully" failed to file his tax returns. August 6, 2014 Trial Tr. at 50 (App'x 127). *See* 26 U.S.C. § 7203 ("Any person required under this title ... to make a return ... who willfully fails to ... make such return ... shall,

Defense counsel further argued that Marinello must have affirmatively "do[ne] something," "[l]ike file a phony return," to be guilty of this offense. August 6, 2014 Trial Tr. at 55 (App'x 132).

Over Marinello's objection, the district court declined to instruct the jury that it had to unanimously agree on at least one of the eight specified means by which Marinello allegedly violated section 7212(a) to find him guilty under that section. No special verdict form was provided to the jury with respect to this offense. Instead, the district court instructed the jury as to the underlying means contained in Count One as follows:

> [T]he indictment alleges multiple methods in which the crime [of violating section 7212(a)'s omnibus clause] can be committed, but the government does not have to prove all of them for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of the obstructive acts listed in the indictment is enough. To return a guilty verdict, all 12 of you must agree that at least one of these has been proved. However, all of you need not agree that the same one has been proved.

August 11, 2014 Trial Tr. at 471 (App'x 433).

---

in addition to other penalties provided by law, be guilty of a misdemeanor....").

The jury convicted Marinello on all counts. He then moved for a judgment of acquittal or a new trial under Federal Rules of Criminal Procedure 29 and 33, respectively, which the government opposed.[4] Marinello argued, *inter alia*, that the phrase "the due administration of this title" in section 7212(a) refers exclusively to pending IRS investigations, and that a defendant may be convicted under the statute only if he knowingly interferes with such an investigation. Employing that construction of the statute, which the Sixth Circuit had previously adopted in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), Marinello contended that he should be acquitted because there was no evidence that he had become aware of the IRS's investigation until his June 1, 2009, interview with Agent Klimczak, which occurred after the offense conduct alleged in the superseding indictment had already taken place.

The district court declined to construe section 7212(a) that narrowly. Noting that a later panel of the Sixth Circuit had limited *Kassouf* to its facts, and that other courts had declined to follow the *Kassouf* court's reasoning, the district court concluded that "[k]nowledge of a pending [IRS] investigation is not an essential element of the crime." Decision and Order at 6–7, *United States v. Marinello*, No. 12 Cr. 53S (W.D.N.Y. June 26, 2015) (App'x 549–50) (citing *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999) and *United States v. Willner*, No. 07 Cr. 183, 2007 WL

---

[4] Before the defense rested at trial, Marinello also made a motion pursuant to Rule 29, which was denied by oral order.

2963711, at *4, 2007 U.S. Dist. LEXIS 75597 (S.D.N.Y. Oct. 11, 2007) (collecting cases)). In the court's view, "[t]he jury was entitled to infer ... that Marinello acted corruptly to impede or obstruct the due administration of the Internal Revenue laws" by otherwise hindering the collection of taxes due. *Id.* at 6 (App'x 549).

In the defendant's Presentence Investigation Report (the "PSR"), the Probation Office calculated the total tax loss from Marinello's activities as approximately $598,215.53 by applying a percentage-based formula to his gross income from 2005 through 2008. *See* U.S. Sentencing Guidelines Manual (hereinafter, "U.S.S.G.") § 2T1.1(c)(2)(A) (U.S. Sentencing Comm'n 2014) (indicating that this formula should be used "unless a more accurate determination of the tax loss can be made"). The total tax loss resulted in a base offense level of twenty. *See* U.S.S.G. §§ 2T1.1(a)(1), 2T4.1(H)–(I) (specifying, for offenses involving willful failure to file returns, a base offense level of 20 where the tax loss is "[m]ore than $400,000" but not more than $1,000,000). A two-level enhancement to the base offense level was applied because Marinello's conviction under Count One implicated an adjustment for obstructing or impeding the administration of justice. *See* U.S.S.G. § 3C1.1. Marinello was also deemed ineligible for the two-level reduction for acceptance of responsibility. *See* U.S.S.G. § 3E1.1(a). In the view of the Probation Office, Marinello had not clearly demonstrated an acceptance of responsibility for his offense conduct in part because he continued to decline to accept responsibility for the obstruction charge and insisted there was a legal basis

to contest this issue. Thus, with a criminal history category of one and a total offense level of twenty-two, Marinello's advisory Guidelines range for sentencing was forty-one to fifty-one months. The Probation Office also determined that Marinello owed the IRS $331,348.08 in corporate income taxes and $20,415 in personal income taxes from 2005 to 2008, and recommended that those amounts be imposed by the court's restitution order.

Marinello filed objections to the findings in the PSR, two of which are relevant to this appeal. First, he argued that the tax loss and restitution amounts were incorrectly calculated. According to Marinello, "a more accurate determination of tax loss c[ould] be made" based on the actual corporate and personal tax returns he ultimately filed, years after the fact, for tax years 2005 through 2008. Objections to the [PSR] and Statement With Respect to Sentencing Factors, dated January 14, 2015, at 2–3 (App'x 514–15) (quoting U.S.S.G. § 2T1.1(c)(2)(A) (emphasis removed)). These returns reflected a tax loss of only $48,890, which would have yielded a base offense level of fourteen instead of twenty. *See* U.S.S.G. § 2T4.1(E). Marinello further asserted that any restitution was also capped at the $48,890 amount.

Second, Marinello urged that the two-level reduction for acceptance of responsibility was applicable.[5] He argued that his conduct merited the

---

[5] Marinello did not argue that he was eligible for an additional one-level reduction under U.S.S.G. § 3E1.1(b), nor does he make any argument with respect to this provision on appeal.

reduction because he admitted to keeping poor business records and not paying his taxes; was previously willing to plead to the misdemeanor Counts Two through Nine; and proceeded to trial only to preserve a dispute concerning whether he could be held criminally liable under the section 7212(a) obstruction charge.

In response, the government asserted that there were a variety of inaccuracies in Marinello's proffered tax returns (such as using an incorrect filing status and improperly claiming his mother as a dependent), which rendered them unreliable for purposes of calculating either an alternative tax loss or restitution amount. The government further contended that the two-level reduction for acceptance of responsibility was inapplicable because Marinello was evasive during his discussions with Agent Klimczak at the June 1, 2009, interview, disputed that he acted with the requisite *mens rea* to be convicted under Count One, and stated at the time the PSR was prepared that he did not accept responsibility for the obstruction charge.

In his reply brief, Marinello did not address any of the alleged inaccuracies the government highlighted in his tax returns. He continued to argue, however, that he deserved the reduction for acceptance of responsibility.

During Marinello's sentencing proceedings, the district court concluded that Marinello's alternative calculation of the tax loss and restitution at issue could not be used in light of the discrepancies the government identified in his proffered tax returns. The court therefore adopted the Probation Office's calculations of those figures and denied Marinello's first

objection. His second objection concerning the acceptance of responsibility reduction was also denied based on the court's view that his case was not one of the "rare" situations specified in the Guidelines where the reduction is appropriate even though the defendant exercised his constitutional right to proceed to trial. Transcript of Sentencing ("Sentencing Tr."), July 1, 2015, at 12 (App'x 566) (applying U.S.S.G. § 3E1.1 cmt. 2).

Marinello addressed the court prior to sentencing. He stated that he realized he had made a mistake, but that he did not accept the over half million dollar tax loss calculation by "a probation officer who probably without using an adding machine can't add a column of numbers together." *Id.* at 19 (App'x 573). After the district court observed that Marinello "expressed no remorse whatsoever," Marinello responded:

> I have complete remorse. I have absolutely complete remorse. I was overwhelmed by the job. I was overwhelmed by everything. Business went—turned south. And I tried to keep the company afloat.
>
> I'm 69 years of age. I should be retired, and I'm working every day of the week. Every month the [IRS] gets a check.

Id. at 20 (App'x 574). The government underscored that the defendant's comments demonstrated that he clearly did not accept responsibility for his actions.

Adopting the criminal history category, total offense level, and Guidelines range recommended by

the Probation Office, the district court imposed a below-Guidelines sentence of thirty-six months' imprisonment and one year of supervised release. The district court also imposed restitution in the amount of $351,763.08, as recommended by the Probation Office. Following the entry of an amended judgment, this timely appeal followed.

DISCUSSION

Marinello makes three arguments on appeal. First, he urges us to adopt the Sixth Circuit's interpretation of the phrase "the due administration of this title" in section 7212(a), as set forth in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), which requires the prosecution to establish the defendant's knowledge of a pending IRS action[6] in order to support a conviction under the omnibus clause. Marinello seeks reversal of his conviction on Count One and dismissal of that count from the superseding indictment because there is no evidence that he knew of the IRS's investigation while engaging in the offense conduct alleged.

Second, Marinello contends that a violation of the omnibus clause must be premised on an underlying affirmative act, not on an omission. Because the district court did not charge the jury with the unanimity instruction he requested or provide it with the special verdict form he suggested, he maintains that his conviction on Count One could have been

---

[6] Marinello's argument presumably encompasses any pending IRS action and not only an IRS investigation or proceeding concerning the defendant charged with the omnibus clause violation, although he does not clarify this point in his appellate briefs.

improperly based on either of the two omissions alleged in the indictment: failure to keep Express Courier's books and records, and failure to provide complete records of personal and corporate income to his accountant. He seeks reversal and remand for a new trial on that ground if his conviction under section 7212(a) is not otherwise vacated.

Third, Marinello argues that vacatur and remand for resentencing is required because the district court procedurally erred in imposing his sentence. In his view, the district court impermissibly rejected his proffered tax returns as a measure of the tax loss and restitution amounts without further inquiry by way of an evidentiary hearing or supplemental briefing. He also asserts that he was entitled to the two-level reduction to his base offense level for acceptance of responsibility because he offered to plead guilty to the eight counts of willful failure to file tax returns.

I. Standard of Review

A district court's interpretation of a federal criminal statute is a question of law subject to *de novo* review by the Court of Appeals. *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012). A defendant's challenge to a jury instruction is also reviewed *de novo*. *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010). We will conclude that the district court committed reversible error if its instruction "either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard." *Id.* (quoting *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006)).

We review the procedural reasonableness of a sentence "under a 'deferential abuse-of-discretion standard.'" *United States v. Jesurum*, 819 F.3d 667, 670 (2d Cir. 2016) (quoting *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). A district court commits procedural error if, as relevant here, it "fails to calculate (or improperly calculates) the Sentencing Guidelines range" or "selects a sentence based on clearly erroneous facts." *United States v. Chu*, 714 F.3d 742, 746 (2d Cir. 2013) (quoting *United States v. Robinson*, 702 F.3d 22, 38 (2d Cir. 2012)). Decisions as to the procedures used to resolve sentencing disputes, including disputes concerning an order of restitution, are reviewed for abuse of discretion, *United States v. Maurer*, 226 F.3d 150, 151–52 (2d Cir. 2000) (per curiam) (citing *United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996)), and "are within the district court's discretion so long as the defendant is given an adequate opportunity to present his position," *Sabhnani*, 599 F.3d at 257–58.

II. A Pending IRS Action and a Defendant's Knowledge of That Action Are Not Offense Elements Under 26 U.S.C. § 7212(a)'s Omnibus Clause

Section 7212(a) criminalizes certain "[a]ttempts to interfere with [the] administration of internal revenue laws." Under section 7212(a),

> [w]hoever [1] corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States

> acting in an official capacity under this title, *or* [2] *in any other way corruptly* or by force or threats of force (including any threatening letter or communication) *obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title*, shall, upon conviction thereof, be [fined or imprisoned, or both].

26 U.S.C. § 7212(a) (emphases added). The first clause addresses conduct specifically directed toward federal officers or employees in the discharge of their duties under Title 26 of the United States Code—the Internal Revenue Code. The second clause, the "omnibus clause," is a catch-all provision that criminalizes "any other way" of corruptly obstructing or impeding the due administration of the Internal Revenue Code. The term "corruptly" within the meaning of this section encompasses conduct that has "the intent to secure an unlawful advantage or benefit either for one's self or for another." *United States v. Parse*, 789 F.3d 83, 121 (2d Cir. 2015) (quoting *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998)).

Marinello asks that we conclude, as the Sixth Circuit did in *Kassouf*, that the statutory phrase "the due administration of this title" under the omnibus clause refers exclusively to pending IRS investigations or proceedings, of which a defendant must have knowledge in order to corruptly obstruct or impede them. For the reasons that follow, we decline to adopt this construction.

In *Kassouf*, the defendant was charged with corruptly endeavoring to obstruct and impede the due administration of the tax laws, in violation of section 7212(a). 144 F.3d at 953. He allegedly failed to maintain partnership books and records, transferred business funds into various bank accounts for personal expenditures, and filed false tax returns that did not disclose substantial assets. *Id.* at 953 & n.1. The district court granted the defendant's motion to dismiss the section 7212(a) count from the indictment for failure to state an offense, finding that the government had not alleged as elements of the crime that the defendant had knowledge of a pending IRS proceeding or investigation. *See id.* at 954. On appeal, the Sixth Circuit affirmed, agreeing with the district court that "due administration of the Title requires some pending IRS action"—such as "subpoenas, audits or criminal tax investigations"—"of which the defendant was aware." *Id.* at 957 & n.2.

The Sixth Circuit based its conclusion on a comparison of the omnibus clause with another statute, 18 U.S.C. § 1503. *See id.* at 957. Section 1503, entitled "Influencing or injuring officer or juror generally," provides in relevant part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States

> magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly* or by threats or force, or by any threatening letter or communication, *influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice,* shall be punished as provided in subsection (b).

18 U.S.C. § 1503(a) (emphasis added). Relying on the similarities between the texts of section 1503(a) and section 7212(a), the Sixth Circuit consulted case law interpreting section 1503 for guidance on how to construe "the due administration of this title" under section 7212(a). *See Kassouf*, 147 F.3d at 956–58. In particular, the Sixth Circuit looked to *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995), a decision addressing the scope of offense conduct covered by section 1503(a)'s broad prohibition on corrupt efforts to influence, obstruct, or impede the due administration of justice, *see id.* at 598–600, 115 S.Ct. 2357. In *Aguilar*, the Supreme Court limited this provision's reach by imposing "a 'nexus' requirement": To be found guilty of this offense, the "action taken by the accused must be with an intent to influence judicial

or grand jury proceedings." *Id.* at 599, 115 S.Ct. 2357; *see also id.* (describing the nexus requirement as "a relationship in time, causation, or logic" between the defendant's offense conduct and a judicial proceeding). In so deciding, the Supreme Court appeared to assume that "the due administration of justice" under section 1503(a) only applied to pending grand jury or judicial proceedings, in line with the way courts have previously read this statutory phrase.[7] *See id.* The Supreme Court's decision was motivated by a concern that section 1503(a) could sweep too broadly: Not just "*any* act, done with the intent to obstruct the due administration of justice, is sufficient to impose criminal liability"; otherwise, the connection between a defendant's corrupt endeavors and a judicial proceeding could be too attenuated. *See id.* at 602, 115 S.Ct. 2357 (emphasis in original) (ellipsis and internal quotation marks removed). Instead, in order to be convicted of corruptly interfering with the due administration of justice under section 1503(a), a defendant must be aware that his conduct is "likely to affect the judicial proceeding." *Id.* at 599, 115 S.Ct. 2357.

Deeming *Aguilar*'s analysis of section 1503(a) to be instructive, including the Supreme Court's implicit adoption of the longstanding reading of "the due

---

[7] *See, e.g., United States v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992) ("Because section 1503 is intended to protect the administration of justice in federal court and those participating therein, due administration of justice has been interpreted as extending only to pending judicial proceedings." (internal quotation marks and citation omitted)).

administration of justice,"[8] the Sixth Circuit interpreted by analogy "the due administration of this title" under section 7212(a) to require, as offense elements, that a defendant (1) have knowledge of (2) "some pending IRS action." *Kassouf*, 144 F.3d at 956-57. Noting again the similar language contained in the two statutes, the court used a canon of construction to find that this similarity permitted it to infer that Congress meant for section 7212(a) to apply to analogous situations. *See id.* at 957–58 (applying the "canon of statutory construction that courts will presume that Congress knew of the prevailing law when it enacted the statute" at issue). The court also expressed its concern that, were the omnibus clause not limited to pending IRS actions, a defendant could be subject to undefined "liability for conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." *Id.* at 957; *see also id.* at 958 ("[I]t would be highly speculative to find conduct such as the destruction of records, which might or might not be needed, in an audit which might or might not ever occur, is sufficient to make out an omnibus clause violation." (citation omitted)). The court then affirmed

---

[8] The independent meaning of "the due administration of justice," however, was never at issue in *Aguilar*—in fact, the defendant there was charged with "corruptly endeavor[ing] to influence, obstruct, and impede [a] *grand jury investigation*." *See id.* at 598–99, 115 S.Ct. 2357 (emphasis added).

the dismissal of the disputed count of the indictment on the basis of the rule it had enunciated.[9] *Id.* at 960.

We think the Sixth Circuit's analogy is inapposite. To begin with, the text of section 1503(a) is distinguishable from section 7212(a) in at least two ways. First, section 1503(a)'s statutory language focuses principally on grand jury or judicial proceedings. Indeed, its prohibition of corrupt endeavors to influence, obstruct, or impede the due administration of justice "follows a long list of specific

---

[9] Judge Daughtrey dissented from the majority's conclusion in this regard, noting that no other circuit at the time had required that a defendant knowingly obstruct or impede a pending IRS action in order to be convicted under section 7212(a)'s omnibus clause. *Kassouf*, 144 F.3d at 960–61 (Daughtrey, *J.*, dissenting in part).

Shortly after *Kassouf* was decided, another panel of the Sixth Circuit suggested its disapproval of this rule by concluding that "*Kassouf* must be limited to its precise holding and facts." *See Bowman*, 173 F.3d at 600; *see also id.* at 599–600 (deciding that "an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within § 7212(a)'s proscribed conduct," even though "no IRS proceeding or investigation was underway" when the defendant engaged in the underlying offense conduct). However, the court has more recently stated to the contrary that the rule articulated in *Kassouf* remains the law of the Sixth Circuit. *See United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014) ("[P]ost-*Kassouf* and post-*Bowman*, a defendant may not be convicted under the omnibus clause unless he is 'acting in response to some pending IRS action of which [he is] aware.'" (second brackets in original) (quoting *United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004))), *cert. denied*, — U.S. ——, 135 S. Ct. 2060, 191 L.Ed.2d 964 (2015).

prohibitions of conduct that interferes with actual judicial proceedings," *United States v. Wood*, 384 Fed.Appx. 698, 704 (10th Cir. 2010), *cert. denied*, 562 U.S. 1225, 131 S.Ct. 1476, 179 L.Ed.2d 315 (2011); *accord Willner*, 2007 WL 2963711, at *4, 2007 U.S. Dist. LEXIS 75597; *see also United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015) (endorsing the reasoning in *Wood*), *cert. denied*, — U.S. ——, 136 S.Ct. 1163, 194 L.Ed.2d 176 (2016). This list—which specifically mentions jurors, officers of the court, magistrate judges, and committing magistrates, as well as "examination[s] or other proceeding[s]" before a magistrate judge or committing magistrate, "verdict[s]," and "indictment[s]"—supports a reading that tethers the "due administration of justice" to actual grand jury or judicial proceedings. *See* 18 U.S.C. § 1503(a). By contrast, section 7212(a) does not contain any such reference to IRS actions, investigations, or proceedings that would support analogizing it to section 1503(a). Instead, the first part of section 7212(a) refers broadly to attempts to interfere with officers or employees "acting in an official capacity" under the tax code, 26 U.S.C. § 7212(a), which suggests that the omnibus provision similarly applies to the full range of these individuals' official duties.

Second, and most apparent, the statutes employ different statutory phrases: "the due administration of *justice*," 18 U.S.C. § 1503(a) (emphasis added), and "the due administration of *this title*," 26 U.S.C. § 7212(a) (emphasis added). This difference indicates that the statutes carry different meanings. *See Kassouf*, 144 F.3d at 960 (Daughtrey, *J.*, dissenting in part) ("[I]f

Congress wished 26 U.S.C. § 7212(a) to be interpreted in an identical fashion, identical language would have been inserted into that statute."). The plain language of section 7212(a)'s omnibus clause "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities." *Willner*, 2007 WL 2963711, at *5, 2007 U.S. Dist. LEXIS 75597 (emphasis in original). As the Sixth Circuit noted in *Kassouf*, the administration of the Internal Revenue Code "encompass[es] a vast range of activities": "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers[']] submissions; as well as monitoring taxpayers' compliance with their obligations." 144 F.3d at 956; *see also Sorensen*, 801 F.3d at 1232 ("[T]he IRS duly administers the internal-revenue laws ... [by] carrying out its lawful functions to ascertain income[and to] compute, assess, and collect income taxes[.]" (internal quotation marks and citation omitted)). In light of these responsibilities, it is apparent that "the IRS does duly administer the tax laws even before initiating a proceeding." *Sorensen*, 801 F.3d at 1232; *see Direct Mktg. Ass'n v. Brohl*, —— U.S. ——, 135 S.Ct. 1124, 1129, 191 L.Ed.2d 97 (2015) ("[T]he Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection."). Thus, it is possible to violate section 7212(a) by corruptly obstructing or impeding the due administration of the Internal Revenue Code "without an awareness of a particular [IRS] action or

investigation" (for instance, "by thwarting the annual reporting of income"). *Wood*, 384 Fed.Appx. at 704.

Section 1503's legislative history also makes clear that Congress intended "the due administration of justice" to refer only to grand jury or judicial proceedings; however, no comparable legislative history points to interpreting "the due administration of this title" under section 7212(a) in a similar manner. A predecessor version of section 1503 criminalized "corrupt [ ] endeavors to influence, intimidate, or impede any witness or officer *in any court of the United States* in the discharge of his duty, or corrupt [ ] ... endeavors to obstruct or impede[ ] the due administration of justice *therein*." *See Pettibone v. United States*, 148 U.S. 197, 202, 13 S.Ct. 542, 37 L.Ed. 419 (1893) (emphases added) (quoting Rev. Stat., Tit. LXX, ch. 4, § 5399 (2d ed. 1878)); *see also Aguilar*, 515 U.S. at 599, 115 S.Ct. 2357 (noting that *Pettibone* "construe[d] the predecessor statute to § 1503"). Although the word "therein" has since been removed from section 1503(a), there is no indication by Congress that, in so doing, it intended to fundamentally alter the statute's meaning. *See Willner*, 2007 WL 2963711, at *4, 2007 U.S. Dist. LEXIS 75597 ("Nothing about the history of revision of [section 1503] ... indicates that the elimination of the last word ['therein'] was intended to affect the meaning.").

In addition to what we think is a mistaken analogy to section 1503(a), we find unpersuasive the vagueness or overbreadth concern identified in *Kassouf* in support of that court's construction of the omnibus clause. The Sixth Circuit narrowly interpreted "the due

administration of this title" under section 7212(a) in part based on a concern that, were proof of a defendant's awareness of a pending IRS action not otherwise required, a defendant could be subject to punishment for engaging in lawful conduct. *See Kassouf*, 144 F.3d at 957–58. But we have already rejected a similar challenge to section 7212(a) on grounds of vagueness and overbreadth. *See Kelly*, 147 F.3d at 176 (agreeing with five other circuits concluding that the use of the term "corruptly" in section 7212(a) does not render this provision unconstitutionally vague or overbroad (citing *United States v. Brennick*, 908 F.Supp. 1004, 1010–13 (D. Mass. 1995))). Moreover, other courts, including the Sixth Circuit, have decided that section 7212(a)'s *"mens rea* requirement" sufficiently "restricts the omnibus clause's reach only to conduct that is committed 'corruptly.'" *United States v. Miner*, 774 F.3d 336, 347 (6th Cir. 2014) (collecting cases), *cert. denied*, — U.S. ——, 135 S.Ct. 2060, 191 L.Ed.2d 964 (2015).[10]

---

[10] To the extent *Kassouf* based its vagueness or overbreadth concern on the Supreme Court's analysis in *Aguilar*, we note that the reliance is likely misplaced. In fashioning the nexus requirement previously discussed, the Supreme Court suggested that its interpretation of the term "corruptly" under section 1503(a) adequately addressed any potential problems of overbreadth, inasmuch as a defendant must be aware that his conduct is "likely to affect the judicial proceeding." *See* 515 U.S. at 599, 115 S.Ct. 2357; *see also id.* at 602, 115 S.Ct. 2357 (concluding that, "if [a man] knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts," the husband could not be

For those reasons, we decline Marinello's invitation to adopt the *Kassouf* rule. Instead, we join three of our sister circuits in concluding that section 7212(a)'s omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation. *See Sorensen*, 801 F.3d at 1232 (disagreeing with *Kassouf* because section 1503(a) and section 7212(a) "are [in]sufficiently similar to apply *Aguilar*'s reasoning to § 7212(a)"); *United States v. Floyd*, 740 F.3d 22, 32 & n.4 (1st Cir.) (determining that "[a] conviction for violation of section 7212(a) does not require proof of either a tax deficiency or an ongoing audit," and rejecting *Kassouf* (citations omitted)), *cert. denied sub nom. Dion v. United States*, — U.S. ——, 135 S.Ct. 124, 190 L.Ed.2d 95 (2014); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) (stating that "the government need not prove that the defendant was aware of an ongoing tax investigation to obtain a conviction under § 7212(a)"), *cert. denied*, 547 U.S. 1132, 126 S.Ct. 2019, 164 L.Ed.2d 786 (2006).[11] Notably, although we have not explicitly

---

convicted under section 1503 because his knowledge of the likely effect on a judicial proceeding is unclear). By raising the specter that the "*due administration*" of the tax code under section 7212(a) could be too vague or overbroad, however, *Kassouf* misconstrues *Aguilar*'s focus on the *mens rea* requirement ("corruptly") as also encompassing a focus on the "due administration" language. We do not read *Aguilar* as expressing any concern regarding, much less tying its holding to, the "due administration" language in section 1503(a).

[11] In addition to the First, Ninth, and Tenth Circuits, the Eleventh Circuit, in a decision that predates *Kassouf*, upheld an attorney's conviction under section 7212(a)'s omnibus clause for creating a

adopted this rule in any previous opinion, we have implicitly applied it by affirming convictions under section 7212(a)'s omnibus clause without discussion of the defendant's awareness of a pending IRS proceeding. *See United States v. McLeod*, 251 F.3d 78, 80 (2d Cir. 2001) (affirming sentence imposed where the defendant helped his clients falsify tax returns), *cert. denied*, 534 U.S. 935, 122 S.Ct. 304, 151 L.Ed.2d 226 (2001); *Kelly*, 147 F.3d at 174–75 (affirming the defendant's conviction for providing a false agreement to the tax authorities to substantiate a deduction on his tax return).

Our conclusion is consistent with at least two other sources. First, in the body of case law that developed within the forty-four years that elapsed between section 7212's enactment in 1954[12] and *Kassouf*'s issuance in 1998, the government assures us (and we have found no reason to doubt) that no court had limited the omnibus clause's application to the corrupt obstruction or impediment of a known and pending IRS action. *See* Appellee's Br. at 19. To the contrary, contemporary model jury instructions for use outside of the Sixth Circuit do not include these criteria as elements of the offense. *See* 3 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* ¶ 59.05,

---

corporation to "disguise the character of [a client's] illegally earned income and repatriate it," even where the attorney had no knowledge that his client was engaged in a "sting operation" with the government against him. *See United States v. Popkin*, 943 F.2d 1535, 1536–37, 1541 (11th Cir. 1991), *cert. denied*, 503 U.S. 1004, 112 S.Ct. 1760, 118 L.Ed.2d 423 (1992).

[12] *See* Act of Aug. 16, 1954, ch. 736, 68A Stat. 855.

Instruction 59–32 & cmt. (2016) (containing pattern instructions or formulations for a violation of section 7212(a)'s omnibus clause in the First, Seventh, Tenth, and Eleventh Circuits).

Second, the Department of Justice's internal tax division policy states that the omnibus clause may be used "to prosecute a person who, *prior to any audit or investigation*, engaged in large-scale obstructive conduct involving the tax liability of third parties." U.S. Dep't of Justice, *Criminal Tax Manual* § 17.03 (2012 ed.), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTMChapter17.pdf (last visited August 1, 2016) (emphasis added), *archived at* https://perma.cc/QWW4-DTJL. Pursuant to this policy, a defendant may be charged under the omnibus clause in the absence of a pending IRS action. *See also id.* § 17.04 ("To establish a Section 7212(a) omnibus clause violation, the government must prove beyond a reasonable doubt that the defendant in any way (1) corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code.").

Because we conclude that, under section 7212(a), "the due administration of this title" is not limited to a pending IRS investigation or proceeding of which the defendant had knowledge, we reject Marinello's first argument as without merit.[13]

---

[13] In his reply brief, Marinello also raises for the first time an argument that the enactment of a statute in 2002 prohibiting the knowing destruction, alteration, or falsification of records "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any

III. An Omnibus Clause Violation May Be Premised on an Omission

Marinello's next argument proceeds in two steps. First, citing *Kelly*, Marinello asserts that an omission cannot form the basis of a conviction under the omnibus clause. Second, to ensure that he was not improperly convicted for a failure to act, he contends that the jury should have been instructed that it was required to unanimously agree on at least one of the underlying means alleged in Count One (two of which pertained to

---

department or agency of the United States ..., *or in relation to or contemplation of any such matter*," 18 U.S.C. § 1519 (emphasis added), demonstrates that Congress employs specific language when it prohibits conduct "not predicated upon the existence of any federal action or proceeding," Appellant's Reply Br. at 9. Marinello points to the absence of similar language in 26 U.S.C. § 7212(a) prohibiting corrupt obstruction or impediment "in relation to or contemplation of" an IRS action—which Congress did not add to section 7212(a) in 2002—as support for his theory that a defendant's knowledge of such a pending action is required to violate the omnibus clause. Ordinarily, we do not address an argument that the district court has not previously considered. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (*per curiam*); *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005). Even if we did so here, however, we have found no authority that supports Marinello's attempt to create offense elements by contrasting 18 U.S.C. § 1519 with 26 U.S.C. § 7212(a). Moreover, "Congressional inaction," such as the lack of retroactive amendment to section 7212(a) in light of section 1519, "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962)).

omissions) and to render a special verdict specifying which of those underlying means it found were met.[14]

In *Kelly*, we described section 7212(a)'s omnibus clause as "render [ing] criminal 'any other' action which serves to obstruct or impede the due administration of

---

[14] Marinello further argues in passing that Count One falsely states that "the defendant's accountant" was not provided with complete and accurate records for tax purposes, *see* Superseding Indictment at 1 (App'x 75), because he maintains that no professional relationship existed between him and Wiegley. The record shows that Marinello consulted with Wiegley, although the two did not sign a contract for accounting services. While the superseding indictment's description of Wiegley could have been more precise, we conclude that Marinello's argument fails for at least two reasons. First, assuming that the jury had relied on the allegations pertaining to "the defendant's accountant" in order to convict under Count One, its verdict demonstrates that, based on the evidence introduced at trial, it agreed with the superseding indictment's description of Wiegley as his accountant. Thus, the jury resolved the instant factual dispute in the government's favor. Moreover, if and to the extent that the superseding indictment's description of Wiegley was erroneous, that error is harmless. The jury clearly did not convict Marinello on Count One based solely on his offense conduct in connection with his consultations with Wiegley, whether or not Wiegley was his accountant. Marinello's counsel effectively conceded at trial that Marinello engaged in all of the other means alleged under Count One, *see* August 6, 2014 Trial Tr. at 51–56 (App'x 128–33), and counsel only disputed whether Marinello performed any of the acts or omissions alleged with the requisite corrupt intent. The jury's verdict of conviction demonstrates that it concluded that the government proved such corrupt intent with respect to the other conduct alleged in the indictment, in which Marinello concedes he engaged. Thus, whether or not the alleged omission describing Wiegley as Marinello's accountant was properly before the jury is immaterial.

the revenue laws." 147 F.3d at 175 (quoting 26 U.S.C. § 7212(a)). From this statement, Marinello attempts to extract the principle that a violation of the omnibus clause must be predicated on a defendant's affirmative "action," and not an omission. But *Kelly* did not cabin offense conduct under the omnibus clause in this manner; section 7212(a) broadly prohibits corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the tax laws "in any other way." *See* 26 U.S.C. § 7212(a). We do not see how a defendant could escape criminal liability under the omnibus clause for a corrupt omission that is designed to delay the IRS in the administration of its duties merely because the offense conduct involved an omission. *Cf. Kelly*, 147 F.3d at 177 (approving a jury instruction defining the term "endeavors" under section 7212(a) to mean "to knowingly and intentionally act *or* to knowingly and intentionally make any effort which has a reasonable tendency to bring about the desired result" (emphasis added)). For example, a defendant surely could be charged under section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide a proper accounting of business income and expenses.[15] While apparently not

---

[15] We nonetheless recognize that the scope of omissions on which an omnibus clause violation could be based is not limitless. *See Wood*, 384 Fed.Appx. at 708 (suggesting it is "a questionable proposition" that a defendant's mere failure to file tax returns could constitute a violation of the omnibus clause, particularly because the "willful failure to file tax returns is addressed in a different section of the Internal Revenue Code, 26 U.S.C. § 7203").

as common as prosecutions based on one or more affirmative acts, we are aware of several cases in which the government has prosecuted on the basis of an omission as a means of violating section 7212(a)'s omnibus clause.[16]

We conclude, then, that an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code under section 7212(a). And it follows that Marinello's second argument on appeal is also without merit because the jury could have relied on his alleged failure to keep Express Courier's books and records, or to provide Wiegley with complete and accurate information on his personal and corporate income, as a basis for its conviction on Count One. No unanimity instruction or special verdict form was therefore

---

Whatever those limits may be, the omissions at issue here do not exceed them.

[16] *See, e.g., Kassouf*, 144 F.3d at 953 n.1 (alleging the defendant "failed to maintain or cause to be maintained partnership books and records"; "failed to report or cause to be reported substantial amounts of interest earned on [certain] bank accounts"; and transferred property "without making or causing to be made any record of that sale or transfer"); *United States v. Armstrong*, 974 F.Supp. 528, 531 (E.D. Va. 1997) (alleging the defendant "provided false information to, and withheld material information from, his tax return preparer with regard to his travel expense reimbursements and income"); *United States v. Bezmalinovic*, No. S3 96 CR 97 MGC, 1996 WL 737037, at *2, 1996 U.S. Dist. LEXIS 18976 (S.D.N.Y. Dec. 26, 1996) (alleging the defendant failed to report salary payments to certain employees "in any IRS Form W-2" or "to remit to the IRS the [payroll and unemployment] tax[es] due and owing").

required in order to distinguish the jury's assessment of the underlying affirmative actions as opposed to the omissions alleged under this count, because there is no requirement under the statute to make certain that, if Marinello were convicted, the conviction was based solely on an affirmative action and not an omission.

Marinello has not raised in this Court the issue of whether a unanimity instruction or special verdict form is required for any other reason during trials arising out of alleged section 7212(a) omnibus clause violations, and we therefore do not decide or offer an opinion with respect to any such argument. His pretrial filings sought an instruction that the jury unanimously agree on at least one of the eight means alleged in order to convict, as well as a special verdict form requiring that the jury specify its findings on each of those means. However, he does not repeat arguments concerning those requests on appeal. *Cf. JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").[17]

---

[17] We note nevertheless that while the Ninth Circuit does not appear to object to the use of a unanimity instruction in this context, *see United States v. Murphy*, 824 F.3d 1197, 1201, 1206 (9th Cir. 2016), at least two courts (the Tenth Circuit and a district court in Washington D.C.) have ruled that the instruction is erroneous. *See Sorensen*, 801 F.3d at 1237 (concluding that the district court erred by requiring unanimity on one or more of the listed means, in part because the instruction "ignored the indictment's language charging that [the defendant] violated § 7212(a) 'by the following means, *among others*....'" (emphasis in

IV. The District Court Did Not Procedurally Err In Determining Marinello's Sentence

Finally, Marinello's remaining arguments—that the district court should have conducted further inquiries to calculate the tax loss and restitution amounts, and should have applied the two-level reduction for acceptance of responsibility—do not convince us that the district court committed procedural error meriting resentencing.

Marinello argues that the district court's "cursory review" of his proffered tax returns in arriving at a tax loss of $598,215.53 and a total restitution amount of $351,763.08, without conducting an evidentiary hearing or receiving supplemental submissions, "was unfair and violated his due process rights." *See* Appellant's Br. at 29. But a district court "is not required, by either the Due Process Clause or the federal Sentencing Guidelines, to hold a full-blown evidentiary hearing in resolving sentencing disputes.... All that is required is that the court afford the defendant some opportunity to rebut the [g]overnment's allegations." *Sabhnani*, 599 F.3d at 258 (quoting *Maurer*, 226 F.3d at 151–52). Here, Marinello challenged the Probation Office's calculations in his objections to the PSR, attaching his

---

original)); *United States v. Adams*, 150 F.Supp.3d 32, 37–38 (D.D.C. 2015) (agreeing with *Sorensen*'s conclusion, and quoting *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) for the proposition that "[a] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime").

personal and corporate tax returns in an effort to show that $48,890 was a more appropriate tax loss and restitution amount. He did not, however, respond on reply to the many inaccuracies the government identified in these returns. The district court considered his objection and, crediting the government's arguments, ultimately rejected it before imposing sentence. Because Marinello was afforded "some opportunity" to dispute the tax loss and restitution amounts, and to respond to the government's arguments with respect to his tax returns, the district court did not abuse its discretion by not obtaining additional information regarding this issue. *See id.*

Nor can we say that the district court abused its discretion by denying Marinello a two-level decrease to his base offense level because he did not "clearly demonstrate[ ] acceptance of responsibility for his offense," a decision to which we accord "great deference on review," *see* U.S.S.G. § 3E1.1(a) & cmt. 5. Marinello's sole relevant contention on appeal is that his "offer[ ] to plead guilty to the failures to file income tax returns" "should have received some consideration in sentencing." Appellant's Br. at 30. But an offer to plead guilty to some counts of an indictment provides limited evidence of acceptance of responsibility; even a defendant who pleads guilty is not guaranteed to receive the adjustment for acceptance of responsibility. *See* U.S.S.G. § 3E1.1 cmt. 3.

Moreover, we agree with the district court's conclusion that Marinello's case is not one of the "rare situations" contemplated in the Guidelines in which a

defendant "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial"—for instance, by "go[ing] to trial to assert and preserve issues that do not relate to factual guilt." *See id.* cmt. 2. Marinello proceeded to trial on the theory that he lacked the requisite *mens rea* to commit the omnibus clause violation, an issue of factual guilt. It was only in post-trial briefing that Marinello's legal argument pertaining to the elements of an omnibus clause violation and the *Kassouf* rule was first raised. In our view, it was reasonable for the district court to deny a reduction for acceptance of responsibility in these circumstances. *See id.* (stating the acceptance of responsibility adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse"); *cf. United States v. Melot*, 732 F.3d 1234, 1244–45 (10th Cir. 2013) (concluding that the district court clearly erred in applying the acceptance of responsibility reduction where the defendant went to trial "so he could challenge the *mens rea* element of the crimes charged in the indictment," including a violation of section 7212(a)' s omnibus clause).[18]

---

[18] Three additional considerations under U.S.S.G. § 3E1.1 bolster the district court's conclusion on this score. First, "prior to adjudication of [his] guilt," no "voluntary restitution payment" to the IRS had been made. *See id.* cmt. 1(C). Second, Marinello did not timely manifest acceptance of responsibility: He stated that he "never got around" to paying his taxes instead of admitting to his guilt during his interview with Agent Klimczak, August 6, 2014 Trial Tr. at 172 (App'x 181), and he persisted in denying

We therefore conclude that the district court did not commit procedural error by using the manner of calculating the tax loss and restitution amounts that it did, or by deciding not to apply a two-level reduction to Marinello's base offense level for acceptance of responsibility.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

---

responsibility for the section 7212(a) count while his PSR was being prepared. *See* U.S.S.G. § 3E1.1 cmt. 1(H) (providing that "timeliness" is a consideration for determining whether a defendant has accepted responsibility). Even during the sentencing proceedings, he told the court that the Probation Office "c[ould]n't add a column of numbers together" to calculate the total tax loss, and blamed his misconduct on feeling "overwhelmed by the job." Sentencing Tr. at 19–20 (App'x 573–74). Third, the district court's application of a U.S.S.G. § 3C1.1 enhancement for obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct," *see* U.S.S.G. § 3E1.1 cmt. 4. Marinello offers no reason to conclude that this is an "extraordinary case[ ]" warranting "adjustments under both §§ 3C1.1 and 3E1.1." *See id.*

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America, Appellee,

v.

Carlo J. Marinello, II, Appellant.

15-2224

|

February 15, 2017

Attorneys and Law Firms

Joseph M. LaTona, Buffalo, NY, for Defendant-Appellant.

Russell T. Ippolito, Jr., Assistant United States Attorney, Buffalo, NY, for James P. Kennedy, Jr., Acting United States Attorney for the Western District of New York,[1] Appellee.

Present: Robert A. Katzmann, Chief Judge, Dennis Jacobs, José A. Cabranes, Rosemary S. Pooler, Reena Raggi, Peter W. Hall, Debra Ann Livingston, Denny Chin, Raymond J. Lohier, Jr., Susan L. Carney, Christopher F. Droney, Circuit Judges.

---

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting United States Attorney James P. Kennedy, Jr., is automatically substituted for former United States Attorney William J. Hochul, Jr.

ORDER

Following disposition of this appeal, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

Dennis Jacobs, *Circuit Judge*, joined by José A. Cabranes, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

DENNIS JACOBS, Circuit Judge, joined by JOSÉ A. CABRANES, Circuit Judge, dissenting from the denial of rehearing in banc:

I respectfully dissent from the denial of rehearing in banc. The panel weighed in on the wrong side of a circuit split, affirmed a criminal conviction based on the most vague of residual clauses, and in so doing has cleared a garden path for prosecutorial abuse.

I

Marinello was convicted at trial on nine counts. Eight of them (for willful failure to file tax returns) raise no issue. The single problematic count is for violating the "omnibus clause" of the criminal portion of the Internal Revenue Code, which makes it a felony to "in any other way corruptly ... obstruct[ ] or impede[ ], or endeavor[ ] to obstruct or impede, the due administration of this title." 26 U.S.C. § 7212(a). *Yes*: "this title" is the entire corpus of the Internal Revenue Code—a slow read in 27 volumes of the United States Code Annotated.

The government charged that Marinello violated the omnibus clause in eight different ways. And the district court instructed the jury that it was enough for conviction that Marinello violated the statute in any single one of those several ways—and that the jurors did not need to agree among themselves as to which.

Among the acts listed in the jury charge as violating the omnibus clause are:

- "failing to maintain corporate books and records for Express Courier [his small business]";
- "failing to provide [his] accountant with complete and accurate information related to [his] personal income and the income of Express Courier";
- "destroying, shredding and discarding business records of Express Courier";
- "cashing business checks received by Express Courier for services rendered"; and
- "paying employees of Express Courier with cash."

839 F.3d at 213 (internal brackets omitted). If this is the law, nobody is safe: the jury charge allowed individual jurors to convict on the grounds, variously, that Marinello did not keep adequate records; that, having kept them, he destroyed them; or that, having kept them and preserved them from destruction, he failed to give them to his accountant.

After conviction on all counts, Marinello moved for a new trial on the ground, inter alia, that the omnibus clause applied only to knowing obstruction of an ongoing IRS investigation, not to every possible impediment to the administration of any of the

uncountable provisions of the Internal Revenue Code; and that he therefore should have been acquitted because there was no evidence that he was aware of an IRS investigation.

The district court rejected the argument and the panel affirmed, holding: "under section 7212(a), 'the due administration of this title' is not limited to a pending IRS investigation or proceeding of which the defendant had knowledge." 839 F.3d at 223. Accordingly, the law in the Second Circuit today is that it is a felony to "corruptly" take (or try to take) any of the actions listed above—or to take or try to take any other action that impedes the "due administration" of the Internal Revenue Code.

The Sixth Circuit, alert to the sweep of criminalizable conduct, held that the omnibus clause was limited to cases in which the defendant knew of a pending IRS action. *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998); *United States v. Miner*, 774 F.3d 336, 342–45 (6th Cir. 2014). The Sixth Circuit's view is now distinctly in the minority, and the panel's opinion here signs on to the emerging consensus of error in the circuit courts.

II

Increasingly, the Supreme Court casts a cold eye on broad residual criminal statutes (particularly omnibus clauses like the one here), and has saved such statutes by construing the statutory text to cabin them.

In *United States v. Aguilar*, the Court considered a similarly worded statute concerning grand juror intimidation: the residual clause imposed criminal

liability for one who "corruptly ... endeavors to influence, obstruct, or impede, the due administration of justice." 515 U.S. 593, 599–600, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) (interpreting 18 U.S.C. § 1503). To curb the impermissible breadth of the wording, the Court (a) implicitly interpreted "the due administration of justice" to require a court or grand jury proceeding (and thus excluded "an investigation independent of the court's or grand jury's authority"), and (b) explicitly required a "nexus" with a grand jury or judicial proceeding to support criminal liability.

Similar alarm about fair warning and overbreadth animates *Arthur Andersen LLP v. United States*, which recognized and generously construed a knowledge requirement to limit the scope of a statute that criminalized "corruptly persuad[ing]" someone to destroy documents. 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) (interpreting 18 U.S.C. § 1512). For much the same reason, the Supreme Court sharply curtailed so-called honest-services fraud in *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Further, in *Yates v. United States*, the government used a provision of the Sarbanes-Oxley Act criminalizing destruction of evidence to prosecute a poaching fisherman who threw fish overboard; the plurality invoked the rule of lenity to reverse on the ground that, under the statute, a fish was not a "tangible object." — U.S. ——, 135 S.Ct. 1074, 1088, 191 L.Ed.2d 64 (2015) (interpreting 18 U.S.C. § 1519). And in *Johnson v. United States*, the Court held that the "residual clause" of the Armed Career Criminal Act was so vague that it failed to provide the

constitutionally required fair notice of what conduct it actually punished. — U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (interpreting 18 U.S.C. § 924(e)). Most recently, in *McDonnell v. United States*, the Court rejected an expansive view of what qualifies as an "official act" in public corruption cases. — U.S. ——, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016).

III

The panel opinion in *Marinello* affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed.

The actus reus for this crime is the failure to keep sufficient books and records. The panel opinion likely took comfort in the mens rea requirement that the act or acts be done "corruptly." Any such comfort is surely an illusion, for two reasons. First, the risk of wrongful conviction, even with a mens rea requirement, is real: the line between aggressive tax avoidance and "corrupt" obstruction can be hard to discern, especially when no IRS investigation is active. Second, *alleging* a corrupt motive is no burden at all. Prosecutorial power is not just the power to convict those we are sure have guilty minds; it is also the power to destroy people. How easy it is under the panel's opinion for an overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*.

The saving requirement that the Sixth Circuit added is that there must have been a pending IRS action of which the defendant was aware. That

measure goes a good way toward setting some bounds. It construes the statute as a specialized tool for active IRS investigations, rather than a prosecutor's hammer that can be brought down upon any citizen.

And what is lost in confining this statute to interference with ongoing proceedings? Failure to pay taxes is already a crime, as is tax evasion. *See* 26 U.S.C. § 7201-7207; 18 U.S.C. § 371. Marinello himself, who is certainly culpable for his tax evasion, was in fact convicted of eight such felonies aside from the single count of violating the omnibus clause. Indiscriminate application of this omnibus clause serves only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted.

The panel opinion does not consider the risk of prosecutorial abuse at all, and dismisses overbreadth and vagueness in a single paragraph—and that paragraph merely cites other decisions. 839 F.3d at 221–22. Instead, the panel opinion spends pages positing differences between the phrases "due administration of justice" and "due administration of this title," and looking to statutory context and legislative history in an attempt to distinguish the Supreme Court's interpretation of a nearly identical statute in *Aguilar*.

The attempt fails. *Aguilar* looked to the conduct specified in the rest of the statute in construing the omnibus clause of 18 U.S.C. § 1503(a), and the panel opinion seeks to distinguish the omnibus clause here (§ 7212(a)) on that basis. But reading § 7212(a) in context subverts rather than supports the panel's

broad interpretation: a contextual reading demonstrates that § 7212(a) is about impediments to the work of *particular officers and employees* of the IRS, rather than to the work of the IRS in the abstract or in whole. The relevant text of § 7212(a) is as follows, with the omnibus clause italicized:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, *or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title*, shall, upon conviction thereof ... The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

The Supreme Court construed the *Aguilar* clause to require a grand jury or judicial proceeding because earlier parts of the *Aguilar* statute implicitly require a grand jury or judicial proceeding. By the same token, the text that precedes the omnibus clause here, and is part of the same sentence and subsection, presupposes an identifiable officer or employee. That is because it prohibits corruptly or threateningly attempting "to intimidate or impede any officer or employee of the

United States acting in an official capacity." Statutory cross-references to § 7212(a) in the Internal Revenue Code (which were passed as part of the same legislative act as § 7212(a) itself[1] also presuppose a particular officer or employee who has been impeded. Section 6531(6) describes it as "relating to intimidation of officers and employees of the United States," and section 7601(b) describes it as forbidding "forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties." 26 U.S.C. § 6531(6); 26 U.S.C. § 7601(b).

The same subsection defines "threats of force" in terms that bear upon individual agents, and thereby compels the inference of an ongoing matter: "The term 'threats of force', as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family." 26 U.S.C. § 7212(a). Both the initial clause of § 7212(a) and the omnibus clause ban threats of force; so the omnibus clause also supposes an identifiable IRS officer or employee. Similarly, the one statutory example of obstruction—in each clause of § 7212(a)—is sending a "threatening letter or communication." Inasmuch as there are nearly 80,000 IRS officers or employees, it is scarcely possible a letter (however threatening) that is sent without a named addressee would in any way "impede" the work of this army.[2]

---

[1] *See* Internal Revenue Code of 1954, Pub.L. 83–591.

[2] The legislative history, discussed in footnote 3, also backs up the view that § 7212(a) is aimed at obstruction of particular IRS officers or employees.

The same point can be made about the destruction of documents. Unless an investigation is ongoing, it is impossible to point to a particular IRS employee among those 80,000 whose work has been impeded. And only when an IRS investigation is ongoing can one posit, *as the statute itself does*, a particular officer who has been impeded (such as by a taxpayer writing a threatening letter or destroying personal documents)—and that officer is the investigator on the case. Reading § 7212(a)'s omnibus clause in light of the section that precedes it thus leads us back to the requirement of an active investigation.

As to legislative history, the panel relies on its absence to distinguish this case from *Aguilar*. 839 F.3d at 221. That is a thin reed; in any event, there is relevant legislative history for § 7212(a), and it confirms my view.[3]

---

[3] The prior version of § 7212(a) only prohibited *forcible* obstruction of IRS officers. Int. Rev. Code of 1939, ch. 34, § 3601(c)(1). When Congress re-wrote the tax code and re-drafted § 7212(a) in 1954, the Senate and House Reports only briefly explained the purpose of § 7212(a) (their explanation for the addition to the statute is in italics):

> Subsection (a) of this section, relating to the intimidation or impeding of any officer or employee of the United States acting in an official capacity under this title, or by force or threat of force attempting to obstruct or impede the due administration of this title is new in part. This section provides for the punishment of threats or threatening acts against agents of the Internal Revenue Service, or any other officer or employee of the United States, or members of the families of such persons, on account of the performance by such agents or officers or employees of their official duties.

Finally, unlike the panel, I decline to defer to the Department of Justice's views to determine the scope of a criminal statute. *Id.* at 223.

Even if the majority is correct—even if any limit to the omnibus clause is insupportable—then we should have gone in banc to determine whether such a limitless statute is constitutional. At some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, "Show me the man and I'll find you the crime."

This section will also punish the corrupt solicitation of an internal revenue employee.

H.R.Rep. No. 1337, 83rd Cong., 2d Sess. (1954); S.Rep. No. 1622, 83rd Cong., 2d Sess. (1954) (emphasis added). If Congress intended to dramatically expand the scope of the law in the way the panel conceives, the legislative history gives no hint of it.

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CARLO J. MARINELLO, II,

Defendant.

DECISION AND ORDER
12-CR-53S

I. INTRODUCTION

On August 12, 2014, a jury convicted Defendant Carlo J. Marinello, II, of obstructing and impeding the due administration of the Internal Revenue laws and failing to file individual and corporate tax returns. (Docket Nos. 81, 87.) Marinello now moves for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure or, alternatively, for a new trial under Rule 33. For the reasons discussed below, Marinello's motion is denied.

II. BACKGROUND

On February 14, 2012, a federal grand jury returned a nine-count indictment against Marinello alleging (1) one count (Count 1) of obstructing and impeding the due administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212 (a), (2) four counts (Counts 2, 4, 6, 8) of failing to file individual tax returns, in violation of 26 U.S.C. § 7203, and (3) four counts

(Counts 3, 5, 7, 9) of failing to file corporate tax returns, in violation of 26 U.S.C. § 7203. (Docket No. 1.) Approximately eight months later, on October 4, 2012, the grand jury returned a similar nine-count superseding indictment, which amended the allegations in Count 1. (Docket No. 29.)

After pretrial motions and proceedings, Marinello went to trial on the superseding indictment, beginning on August 5, 2014. (Docket No. 76.) The six-day trial concluded on August 12, 2014. (Docket No. 81.) Upon the close of proof on August 11, 2014, Marinello moved for a judgment of acquittal, which this Court denied the next day. (Docket Nos. 79, 80.) The jury subsequently found Marinello guilty on all counts. (Docket Nos. 81, 87.)

Following the verdict, Marinello timely filed the instant motion for judgment of acquittal or, alternatively, for a new trial, on September 9, 2014. (Docket No. 92.) The motion is fully briefed. (Docket Nos. 92, 94, 95.) Marinello seeks judgment of acquittal on all counts of conviction due to insufficiency of the evidence. He seeks a new trial on the same basis to avoid a miscarriage of justice.

III. DISCUSSION

A. Marinello's Rule 29 Motion

* * * * *

2. Count 1

Count 1 of the superseding indictment charged Marinello with obstructing or impeding the due administration of the Internal Revenue laws, in

violation of 26 U.S.C. § 7212 (a). The statute provides as follows:

> **Corrupt or forcible interference.** – Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force," as sued in this subsection, means threats of bodily harm to the office or employee of the United States or to a member of his family.

The superseding indictment alleges that Marinello violated § 7212 (a) by

> (1) failing to maintain corporate books and records for Express Courier Group/Buffalo, Inc. of which the

defendant was an employee, officer, owner and operator;

(2) failing to provide the defendant's accountant with complete and accurate information related to the defendant's personal income and the income of Express Courier;

(3) destroying, shredding and discarding business records of Express Courier;

(4) cashing business checks received by Express Courier for services rendered;

(5) hiding income earned by Express Courier in personal and other non-business bank accounts;

(6) transferring assets to a nominee;

(7) paying employees of Express Courier with cash; and

(8) using business receipts and money from business accounts to pay personal expenses, including the mortgage for the residence in which the defendant resided and expenses related to the defendant's mother's care at a senior living center.

(Docket No. 29.)

Marinello admits that he engaged in allegations (1), (3), (4), (6), (7), and (8) above, but he argues that the evidence presented at trial was nonetheless insufficient

to sustain his conviction on Count 1, because the government failed to introduce sufficient evidence that he acted with the intent to *corruptly* endeavor to obstruct or impede the due administration of the Internal Revenue laws and failed to establish that he knew that the Internal Revenue Service was investigating him.

To prove a violation of § 7212 (a), the government must establish two elements beyond a reasonable doubt: (1) that the defendant acted corruptly; and (2) that the defendant acted to impede or obstruct the due administration of the Internal Revenue laws. *See* 1 L. Sand, et al., *Modern Federal Jury Instructions-Criminal*, ¶ 59.05, at Instruction 59-32 (2014). "To act corruptly means to act with the intent to secure an unlawful advantage or benefit either for oneself or for another." 1 L. Sand, et al., *Modern Federal Jury Instructions-Criminal*, ¶ 59.05, at Instruction 59-33 (2014); *see also United States v. Coplan*, 703 F.3d 46, 72-73 (2d Cir. 2012); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998) (citing *United States v. Hanson*, 2 F.3d 942, 946-47 (9th Cir. 1993)).

The government presented sufficient evidence at trial from which the jury could reasonably infer that Marinello engaged in the alleged conduct to secure an unlawful advantage and to obstruct the due administration of the Internal Revenue laws. For example, Agent Klimczak testified that Marinello was evasive and untruthful when he was interviewed on June 1, 2009. Alan Wiegley, CPA, testified that he advised Marinello not to destroy business records, yet Marinello destroyed them anyway. And along with

other proof admitted into evidence at trial, Marinello admits that he failed to maintain records, destroyed records he had, cashed checks due the corporation, transferred assets to his wife, paid his employees in cash, and used corporate funds for personal expenses. (Affirmation of John Humann, Docket No. 92, ¶ 8.) The jury was entitled to infer from all of these acts, both individually and collectively, that Marinello acted corruptly to impede or obstruct the due administration of the Internal Revenue laws.

Marinello's second argument—that the government failed to establish that he knew that the Internal Revenue Service was investigating him—is also easily disposable. In short, there is no such requirement in the Second Circuit. Knowledge of a pending investigation is not an essential element of the crime. *See* 1 L. Sand, et al., *Modern Federal Jury Instructions-Criminal*, ¶ 59.05, at Instruction 59-32 (2014) (setting forth two elements, neither of which is knowledge of a pending investigation). The case Marinello relies on, *United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998), is a Sixth Circuit case that has been limited to its facts in its own circuit and has been rejected by other circuits and at least one district court in the Second Circuit. *See United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999) (limiting *Kassouf* to its facts); *United States v. Willner*, No. 07 Cr. 183 (GEL), 2007 WL 2963711, at *2-*4 (S.D.N.Y. Oct. 11, 2007) (rejecting *Kassouf* and citing cases). The government's proof on each of the two essential elements was thus sufficient to sustain the jury's guilty verdict on Count 1.

For these reasons, this Court finds that Marinello is not entitled to judgment of acquittal on Count 1 of the superseding indictment.

* * * * *

IV. CONCLUSION

For the reasons stated above, Marinello's Motion for a Judgment of Acquittal, or in the alternative, for a New Trial, is denied.

V. ORDERS

IT HEREBY IS ORDERED, that Marinello's Motion for a Judgment of Acquittal, or in the alternative, for a New Trial (Docket No. 92) is DENIED.

SO ORDERED.

Dated: June 26, 2015
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 22 2017
OFFICE OF THE CLERK

No. 16-1144

In the Supreme Court of the United States

CARL J. MARINELLO, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
DAVID A. HUBBERT
Acting Assistant Attorney General
S. ROBERT LYONS
STANLEY J. OKULA, JR.
GREGORY S. KNAPP
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Arthur Andersen LLP v. *United States*, 544 U.S. 696 (2005) 11
Crim v. *United States*, 132 S. Ct. 2682 (2012) 7
Direct Mktg. Ass'n v. *Brohl*, 135 S. Ct. 1124 (2015) 9
Massey v. *United States*, 547 U.S. 1132 (2006) 7
Pettibone v. *United States*, 148 U.S. 197 (1893) 8
Sansone v. *United States*, 380 U.S. 343 (1965) 12
Sorensen v. *United States*, 136 S. Ct. 1163 (2016) 7
United States v. *Aguilar*, 515 U.S. 593 (1995) 8
United States v. *Ashqar*, 582 F.3d 819 (7th Cir. 2009), cert. denied, 559 U.S. 974 (2010) 11
United States v. *Bishop*, 412 U.S. 346 (1973) 13
United States v. *Bowman*, 173 F.3d 595 (6th Cir. 1999) 16, 17
United States v. *Corner*, 598 F.3d 411 (7th Cir. 2010) 18
United States v. *Crim*, 451 Fed. Appx. 196 (3d Cir. 2011), cert. denied, 132 S. Ct. 2682 (2012) 14, 15
United States v. *Dykstra*, 991 F.2d 450 (8th Cir.), cert. denied, 510 U.S. 880 (1993) 10
United States v. *Floyd*, 740 F.3d 22 (1st Cir.), cert. denied, 135 S. Ct. 124 (2014) 11, 15
United States v. *Frank*, 354 F.3d 910 (8th Cir. 2004) 11

Cases--Continued: Page

United States v. *Gilbert*, No. 3:09-CR-57, 2009 WL 2382445 (W.D. Ky. July 30, 2009) 16
United States v. *Kassouf*, 144 F.3d 952 (6th Cir. 1998) 5, 7, 14, 17
United States v. *Kelly*, 147 F.3d 172 (2d Cir. 1998) 10, 12
United States v. *Lovern*, 293 F.3d 695 (4th Cir.), cert. denied, 537 U.S. 1058 (2002) 10
United States v. *Massey*, 419 F.3d 1008 (9th Cir. 2005), cert. denied, 547 U.S. 1132 (2006) 15
United States v. *Miner*, 774 F.3d 336 (6th Cir. 2014), cert. denied, 135 S. Ct. 2060 (2015) 14, 16
United States v. *Mitchell*, 985 F.2d 1275 (4th Cir. 1993) 15
United States v. *Pansier*, 576 F.3d 726 (7th Cir. 2009) 10
United States v. *Phipps*, 595 F.3d 243 (5th Cir.), cert. denied, 560 U.S. 935 (2010) 15
United States v. *Popkin*, 943 F.2d 1535 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992) 10, 14, 15
United States v. *Reed*, 77 F.3d 139 (6th Cir.), cert. denied, 517 U.S. 1246 (1996) 17
United States v. *Reeves*, 752 F.2d 995, (5th Cir.), cert. denied, 474 U.S. 834 (1985) 11, 12
United States v. *Richardson*, 676 F.3d 491 (5th Cir. 2012) 11
United States v. *Scheuneman*, 712 F.3d 372 (7th Cir. 2013) 15
United States v. *Sorensen*, 801 F.3d 1217 (10th Cir. 2015), cert. denied, 136 S. Ct. 1163 (2016) 13, 15
United States v. *Williams*, 644 F.2d 696 (8th Cir.), cert. denied, 454 U.S. 841 (1981) 15
Wood v. *United States*, 562 U.S. 1225 (2011) 7

Statutes and rule: Page

Internal Revenue Code (26 U.S.C.)
§ 7201 ..... 12, 13
§ 7203 ..... 2, 4, 13
§ 7206 13
§ 7206(1) 13
§ 7212 4
§ 7212(a) ..... *passim*
Rev. Stat. § 5399 (1878) 8
18 U.S.C. 1503 12
18 U.S.C. 1503(a) 7, 8, 11
18 U.S.C. 1512(b) 11
Fed. R. App. P. 35 advisory committee's note (1998) (Amendments) 17

Miscellaneous:

2 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* (2016) 11
U.S. Dep't of Justice, *Criminal Tax Manual* (2012), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf 13

Cases—Continued: Page

United States v. *Gilbert*, No. 3:09-CR-57, 2009 WL 2382445 (W.D. Ky. July 30, 2009) 16
United States v. *Kassouf*, 144 F.3d 952 (6th Cir. 1998) 5, 7, 14, 17
United States v. *Kelly*, 147 F.3d 172 (2d Cir. 1998) 10, 12
United States v. *Lovern*, 293 F.3d 695 (4th Cir.), cert. denied, 537 U.S. 1058 (2002) 10
United States v. *Massey*, 419 F.3d 1008 (9th Cir. 2005), cert. denied, 547 U.S. 1132 (2006) 15
United States v. *Miner*, 774 F.3d 336 (6th Cir. 2014), cert. denied, 135 S. Ct. 2060 (2015) 14, 16
United States v. *Mitchell*, 985 F.2d 1275 (4th Cir. 1993) 15
United States v. *Pansier*, 576 F.3d 726 (7th Cir. 2009) 10
United States v. *Phipps*, 595 F.3d 243 (5th Cir.), cert. denied, 560 U.S. 935 (2010) 15
United States v. *Popkin*, 943 F.2d 1535 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992) 10, 14, 15
United States v. *Reed*, 77 F.3d 139 (6th Cir.), cert. denied, 517 U.S. 1246 (1996) 17
United States v. *Reeves*, 752 F.2d 995, (5th Cir.), cert. denied, 474 U.S. 834 (1985) 11, 12
United States v. *Richardson*, 676 F.3d 491 (5th Cir. 2012) 11
United States v. *Scheuneman*, 712 F.3d 372 (7th Cir. 2013) 15
United States v. *Sorensen*, 801 F.3d 1217 (10th Cir. 2015), cert. denied, 136 S. Ct. 1163 (2016) 13, 15
United States v. *Williams*, 644 F.2d 696 (8th Cir.), cert. denied, 454 U.S. 841 (1981) 15
Wood v. *United States*, 562 U.S. 1225 (2011) 7

Statutes and rule: Page

Internal Revenue Code (26 U.S.C.)
§ 7201 ..... 12, 13
§ 7203 ..... 2, 4, 13
§ 7206 13
§ 7206(1) 13
§ 7212 4
§ 7212(a) ..... *passim*
Rev. Stat. § 5399 (1878) 8
18 U.S.C. 1503 12
18 U.S.C. 1503(a) 7, 8, 11
18 U.S.C. 1512(b) 11
Fed. R. App. P. 35 advisory committee's note (1998) (Amendments) 17

Miscellaneous:

2 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* (2016) 11
U.S. Dep't of Justice, *Criminal Tax Manual* (2012), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf 13

In the Supreme Court of the United States

No. 16-1144

CARL J. MARINELLO, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 839 F.3d 209.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2016. A petition for rehearing was denied on February 15, 2017 (Pet. App. 40a). The petition for a writ of certiorari was filed on March 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of corruptly endeavoring to obstruct or impede the due administration of the tax laws, in violation of 26 U.S.C. 7212(a); and eight counts of willfully failing to file tax returns, in

violation of 26 U.S.C. 7203. The district court sentenced petitioner to 36 months of imprisonment, to be followed by one year of supervised release. The court of appeals affirmed. Pet. App. 1a-39a.

1. Petitioner owned and managed Express Courier Group/Buffalo, Inc. (Express Courier), which operated a freight service between the United States and Canada. Pet. App. 3a. For over a decade, petitioner failed to file corporate and personal income tax returns. *Id.* at 4a. Petitioner paid his employees in cash and did not issue them (or himself) the documents necessary to report their income to the Internal Revenue Service (IRS). *Id.* at 3a-4a. He shredded or discarded most of Express Courier's records, including bank account statements, employee work statements, receipts, and bills. *Id.* at 3a. Petitioner also frequently diverted corporate funds for his personal use, including by paying his mortgage and his mother's living expenses from business accounts and by having the company make weekly cash "contributions" to his wife. *Id.* at 4a.

In 2004, the IRS received an anonymous tip that petitioner was engaged in an unlawful scheme to avoid paying taxes. Pet. App. 4a. The IRS investigated the allegation but was unable to substantiate it based on the information then available. *Ibid.* Petitioner had no knowledge of that investigation. *Ibid.*

In 2005, petitioner admitted to his attorney that he had not filed tax returns for several years. Pet. App. 4a. The attorney told petitioner that failing to file tax returns was improper and referred him to a certified public accountant. *Ibid.* The accountant, too, told petitioner that he and Express Courier needed to file tax returns and pay taxes. *Ibid.* The accountant asked petitioner to produce Express Courier's records

so that the accountant could submit the necessary information to the IRS, but petitioner (who had destroyed the records) never did so. *Ibid.* Instead, he ignored the advice of his lawyer and accountant and continued his practice of keeping no business records and not filing tax returns. *Id.* at 5a.

In 2009, the IRS reopened its investigation of petitioner. Pet. App. 5a. During an interview with an IRS special agent at petitioner's home, petitioner stated that he "could not recall the last time he had filed an income tax return." *Ibid.* Petitioner initially told the agent that he did not file personal or corporate tax returns because he and Express Courier made less than $1000 per year, *ibid.*, but that was false: in each year between 2005 and 2008, for example, Express Courier took in hundreds of thousands of dollars in gross receipts and petitioner diverted tens of thousands of dollars from the corporation's coffers to pay his personal expenses. *Ibid.*

Petitioner eventually admitted to the IRS agent that he knew he was supposed to file tax returns and pay taxes but that he "never got around to it." Pet. App. 5a (citation omitted). Petitioner also acknowledged that he took money from Express Courier to pay his personal expenses and that he had systematically destroyed Express Courier's records over the course of several years. *Ibid.* Petitioner told the agent that he destroyed the records because it was "the easy way out" and was "what he had been doing all along." *Id.* at 6a (brackets and citation omitted).

2. A federal grand jury charged petitioner with one count of corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue Code, in violation of 26 U.S.C. 7212(a) (Count 1); and eight

counts of willfully failing to file individual and corporate tax returns, in violation of 26 U.S.C. 7203. C.A. App. 75-84.

Count 1 alleged a violation of the so-called "omnibus clause" of Section 7212, which makes it a crime to "corruptly * * * obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration" of the Internal Revenue Code "in any * * * way." 26 U.S.C. 7212(a). The grand jury alleged that petitioner violated that provision by, "among other thing[s]":

(1) "failing to maintain corporate books and records" for Express Courier;

(2) "failing to provide [petitioner's] accountant with complete and accurate information" regarding petitioner's personal income and Express Courier's business income;

(3) "destroying, shredding and discarding business records of Express Courier";

(4) "cashing business checks received by Express Courier";

(5) "hiding income earned by Express Courier in personal and other non-business bank accounts";

(6) "transferring [Express Courier's] assets to a nominee";

(7) "paying employees of Express Courier with cash"; and

(8) using money from Express Courier's business accounts "to pay personal expenses."

C.A. App. 75-76; see Pet. App. 6a-7a.

The district court instructed the jury that, to convict petitioner on Count 1, it needed to find unanimously and beyond a reasonable doubt that petitioner "acted corruptly" and "with the intent to impede or obstruct the due administration of the Internal Revenue laws." C.A. App. 432. The court explained that a person acts "corruptly" if he "act[s] with the intent to secure an unlawful advantage or benefit, either for [him]self or for another." *Ibid.* The court also instructed the jury, over petitioner's objection, that it had to unanimously agree that petitioner committed "at least one" of the "obstructive acts" listed in the superseding indictment but that it need not agree on which specific act petitioner committed. *Id.* at 433; see Pet. App. 7a-9a. The jury convicted petitioner on all counts. Pet. App. 10a.

Petitioner moved for a judgment of acquittal or a new trial on Count 1 on the ground that the government failed to prove that he was aware of a pending IRS investigation at the time he engaged in obstructive conduct and that he "knowingly interfere[d] with [that] investigation." Pet. App. 10a. The district court concluded that Section 7212(a) does not require such proof and denied petitioner's motion. *Id.* at 10a-11a; see *id.* at 51a-57a.

3. The court of appeals affirmed. Pet. App. 1a-39a. As relevant here, petitioner argued that a conviction under the omnibus clause of Section 7212(a) requires proof that the defendant acted with knowledge of a pending IRS investigation. Pet. C.A. Br. 23-25. Petitioner noted that the Sixth Circuit had adopted such a requirement, see *United States* v. *Kassouf*, 144 F.3d 952, 957 (1998), and he urged the court of appeals to do the same, see Pet. C.A. Br. 23-25.

The court of appeals rejected petitioner's argument. Pet. App. 17a-30a. The court noted that, in the years since *Kassouf* was decided, every other court of appeals to have considered the question had rejected the Sixth Circuit's interpretation of Section 7212(a) and had held that the omnibus clause "criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation." *Id.* at 28a (citing cases). As the court explained, Section 7212(a) "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities," and because "the IRS does duly administer the tax laws even before initiating a proceeding," a defendant need not be "aware[] of a particular [IRS] action or investigation" at the time he corruptly engages in acts of obstruction. *Id.* at 25a-26a (citations omitted; second brackets in original).[1]

4. Petitioner sought rehearing en banc, which the court of appeals denied. Pet. App. 41a. Judge Jacobs dissented from the denial of rehearing en banc, arguing that *Kassouf*'s interpretation of Section 7212(a) was correct. *Id.* at 41a-50a.

ARGUMENT

Petitioner contends (Pet. 11-20) that this Court's review is warranted to determine whether the offense of corruptly endeavoring to obstruct the administra-

---

[1] Petitioner also argued on appeal that Section 7212(a) criminalizes only corrupt affirmative acts, not corrupt "failure[s] to perform an act," Pet. C.A. Br. 26, and that the district court erred in calculating the amounts of loss and restitution at sentencing, *id.* at 29-30. The court of appeals rejected those claims, Pet. App. 31a-39a, and petitioner does not renew them in his petition for a writ of certiorari.

tion of the tax laws, in violation of 26 U.S.C. 7212(a), requires proof that the defendant knew about a pending IRS action. That contention lacks merit. The court of appeals' decision is consistent with the interpretation of Section 7212(a) adopted by most other courts of appeals and does not conflict with any decision of this Court. Although the Sixth Circuit reached a different conclusion in *United States* v. *Kassouf*, 144 F.3d 952 (1998), that court has vacillated in its approach to Section 7212(a) over the years and has not yet had an appropriate opportunity to reconsider *Kassouf*'s holding in an en banc proceeding. This Court has repeatedly denied other petitions raising the same issue.[2] Nothing supports a different result in this case.

1. The omnibus clause of Section 7212(a) applies to those who corruptly endeavor to obstruct or impede "the due administration" of the Internal Revenue Code. 26 U.S.C. 7212(a). As the court of appeals noted, the IRS administers the Internal Revenue Code in ways that do not involve a formal administrative action, investigation, or proceeding. Pet. App. 25a-26a. Nothing in the statute's text requires that an IRS action, investigation, or proceeding already be underway when a defendant endeavors to obstruct the IRS's administration of the tax laws.

Rather than rely on the text of Section 7212(a), petitioner principally invokes (Pet. 17-20) an analogy to the general obstruction-of-justice statute, 18 U.S.C. 1503(a), which applies to any person who "corruptly or

---

[2] See *Sorensen* v. *United States*, 136 S. Ct. 1163 (2016) (No. 15-595); *Crim* v. *United States*, 132 S. Ct. 2682 (2012) (No. 11-8948); *Wood* v. *United States*, 562 U.S. 1225 (2011) (No. 10-7419); *Massey* v. *United States*, 547 U.S. 1132 (2006) (No. 05-8633).

by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." *Ibid.* In *United States* v. *Aguilar*, 515 U.S. 593 (1995), this Court held that a corrupt endeavor under that provision must have a "nexus" in time, causation, or logic to the "administration of justice," which the Court defined as a judicial or grand jury proceeding. *Id.* at 599-600.

In reaching that conclusion, the Court relied on the "common" understanding of the term "administration of justice," *Aguilar*, 515 U.S. at 600-601 (citation omitted), and on its earlier decision in *Pettibone* v. *United States*, 148 U.S. 197 (1893), which concerned a predecessor statute to Section 1503(a) that prohibited obstruction of "the due administration of justice" in "any court of the United States." *Id.* at 202 (citing Rev. Stat. § 5399 (1878)). In *Pettibone*, the Court held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice *in a court* unless it appears that he knew or had notice that justice was being administered *in such court*." *Id.* at 206 (emphases added). Drawing on that history, *Aguilar* concluded that Section 1503(a)'s reference to the "administration of justice" applies to actions taken "with an intent to influence judicial or grand jury proceedings." 515 U.S. at 599. The Court expressly distinguished those judicial proceedings from "some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority." *Ibid.*

Aguilar's analysis is not transferrable to Section 7212(a). Section 1503(a) refers to obstruction of "justice," which this Court had previously associated with proceedings "in a court." Section 7212(a), in contrast,

refers to obstruction of the "due administration *of this title*" (*i.e.*, the Internal Revenue Code). 26 U.S.C. 7212(a) (emphasis added). As the court of appeals explained, "the IRS does duly administer the tax laws even before initiating" any particular "proceeding" involving an individual taxpayer, including "by carrying out [the agency's] lawful functions to ascertain income and to compute, assess, and collect income taxes." Pet. App. 25a (brackets and citations omitted); see *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1129 (2015) (recognizing that "information gathering" is "a phase of tax administration procedure that occurs before assessment, levy, or collection"). No predecessor statute or prior judicial construction supports the addition of an atextual pending-IRS-action requirement in Section 7212(a) or suggests that a person cannot corruptly endeavor to obstruct or impede actions that the IRS could be expected to take in the course of administering the tax laws.

Furthermore, unlike justice administered in a court proceeding—which is a defined, discrete event—tax administration is continuous, ubiquitous, and universally known to exist. People are therefore on notice that the IRS is administering the tax code even when they are not aware of a specific, pending proceeding against them. Corrupt efforts to obstruct that administration, including by destroying corporate records and diverting corporate funds in an attempt to frustrate efforts to determine tax liability and to avoid the payment of taxes that are lawfully due, come squarely within the terms of Section 7212(a).

Indeed, petitioner's construction of Section 7212(a) would, in the particular context of that provision, threaten to render the omnibus clause superfluous.

The first clause of Section 7212(a) specifically addresses corrupt endeavors "to intimidate or impede any officer or employee of the United States acting in an official capacity under this title." 26 U.S.C. 7212(a); see Pet. 19 (citing legislative history of Section 7212(a) for the proposition that Congress sought to prohibit "interfer[ence] with IRS employees' enforcement activities"). But the omnibus clause is unmistakably broader, reaching corrupt endeavors intended "in any other way" to "obstruct or impede[] the due administration of this title." 26 U.S.C. 7212(a). Unlike the first clause, the omnibus clause does not require action directed toward any particular IRS agent, as the lower courts have repeatedly recognized.[3] Interpreting the omnibus clause to require proof of a specific pending action or proceeding conducted by the IRS and its agents would effectively eliminate any distinction between the first and second clauses of Section 7212(a).

---

[3] See *United States* v. *Pansier*, 576 F.3d 726, 734 (7th Cir. 2009) (noting that Section 7212(a) "contains two distinct clauses, which each describe a separate offense"); *United States* v. *Lovern*, 293 F.3d 695, 700 & n.5 (4th Cir.) (same), cert. denied, 537 U.S. 1058 (2002); *United States* v. *Kelly*, 147 F.3d 172, 175 (2d Cir. 1998) ("[A]lthough the first clause pertains only to conduct directed against a government official, the second or 'omnibus' clause is not so limited."); *United States* v. *Dykstra*, 991 F.2d 450, 452 (8th Cir.) (noting that the omnibus clause "conspicuously omits the requirement that conduct be directed at 'an officer or employee of the United States government'") (citation omitted), cert. denied, 510 U.S. 880 (1993); *United States* v. *Popkin*, 943 F.2d 1535, 1539 (11th Cir. 1991) (stating that the omnibus clause "expands the reach of the statute" and that the prohibited act "need not be an effort to intimidate or impede an individual officer or employee"), cert. denied, 503 U.S. 1004 (1992).

2. Petitioner asserts (Pet. 14-16) that curtailing the reach of the omnibus clause by requiring knowledge of a pending IRS action is necessary to avoid constitutional vagueness concerns and to prevent the exercise of "unfettered discretion [by] prosecutors." But the courts have found the necessary limits in the statute's *mens rea* requirement, which requires that the defendant act "corruptly." 26 U.S.C. 7212(a). As the district court instructed the jury in this case, that element requires the government to prove beyond a reasonable doubt that the defendant "act[ed] with the intent to secure an unlawful advantage or benefit either for [him]self or for another." C.A. App. 432; see, *e.g.*, *United States* v. *Floyd*, 740 F.3d 22, 31 (1st Cir.) (explaining that the term "corruptly" in Section 7212(a) means "acting with an intent to procure an unlawful benefit either for the actor or for some other person," and citing cases), cert. denied, 135 S. Ct. 124 (2014); 2 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* ¶ 59-33 (2016) (same).

That definition is more exacting than the definition of the term "corruptly" in 18 U.S.C. 1503(a).[4] In *United States* v. *Reeves*, 752 F.2d 995, cert. denied, 474 U.S. 834 (1985), the Fifth Circuit explained the

---

[4] See, *e.g.*, *United States* v. *Richardson*, 676 F.3d 491, 508 (5th Cir. 2012) (defining "corruptly" in Section 1503(a) to mean "knowingly and dishonestly" or "with an improper motive"); *United States* v. *Ashqar*, 582 F.3d 819, 823 (7th Cir. 2009) ("with the purpose of wrongfully impeding the due administration of justice"), cert. denied, 559 U.S. 974 (2010); *United States* v. *Frank*, 354 F.3d 910, 922 (8th Cir. 2004) ("with an improper or evil motive or with the purpose of obstructing the due administration of justice"); cf. *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 705 (2005) (interpreting "corruptly" in 18 U.S.C. 1512(b) to mean "wrongful, immoral, depraved, or evil").

reasons for that difference. Because Section 1503 "covers only conduct that is related to a pending judicial proceeding," it "presupposes a proceeding the disruption of which will almost necessarily result in an improper advantage to one side in the case." *Id.* at 999. By contrast, "interference with the administration of the tax laws" in violation of Section 7212(a) "need not concern a proceeding in which a party stands to gain an improper advantage," so "there is no reason to presume that *every* annoyance or impeding of an IRS agent is done *per se* 'corruptly.'" *Ibid.* By limiting Section 7212(a) to "corrupt" acts "done with the intent to secure an unlawful benefit either for oneself or for another," *id.* at 1001, Congress "specifically insure[d] that potential violators will be on notice of what constitutes corrupt behavior under [S]ection 7212(a)," *id.* at 999; see *id.* at 999-1000 (rejecting interpretation that would have made any "bad," "evil," or "improper" purpose sufficient); cf. *United States* v. *Kelly*, 147 F.3d 172, 177 (2d Cir. 1998) (finding that the term "corruptly endeavors" in Section 7212(a) is "as comprehensive and accurate as if the word 'willfully' was incorporated in the statute").

Nor is there any merit to petitioner's suggestion (Pet. 15) that his proposed construction is necessary to avoid making Section 7212(a) redundant of other tax offenses. Even without a pending-proceeding requirement, the elements of Section 7212(a) differ from those of the other offenses petitioner identifies. For example, tax evasion requires proof of willfulness, the existence of a tax deficiency, and an affirmative act of evading or attempting to evade the tax. 26 U.S.C. 7201; see *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). Filing a fraudulent tax return re-

quires that the defendant willfully make and subscribe to a return, under penalty of perjury, which the defendant does not believe to be true and correct as to a material matter. 26 U.S.C. 7206(1); see *United States* v. *Bishop*, 412 U.S. 346, 350 (1973). Neither offense covers corrupt acts that fall short of actually filing a return, evading an existing deficiency, or attempting to do so. And both offenses carry penalties that are equally or more serious than a violation of the omnibus clause of Section 7212(a). See 26 U.S.C. 7201 (up to five years of imprisonment); 26 U.S.C. 7206 (up to three years of imprisonment); cf. *United States* v. *Sorensen*, 801 F.3d 1217, 1226 (10th Cir. 2015) (explaining that tax evasion is a "more serious crime" than tax obstruction and "requires different culpability and wrongdoing"), cert. denied, 136 S. Ct. 1163 (2016).[5]

The omnibus clause also serves an important role that is not served by the tax evasion and fraud statutes. "In a system of taxation such as ours which relies principally upon self-reporting, it is necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining

---

[5] Petitioner asserts (Pet. 15) that the court of appeals' interpretation of Section 7212(a) would also encompass the misdemeanor offense of willfully failing to pay a tax or file a return. See 26 U.S.C. 7203. The court of appeals doubted that assertion, see Pet. App. 33a n.15, and it is not presented here. Consistent with Department of Justice policy, petitioner's failures to file tax returns were charged as standalone offenses and not as obstructive acts. See C.A. App. 76-84; see also U.S. Dep't of Justice, *Criminal Tax Manual* § 17.04(2) (2012), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf (providing that "[p]rosecutors should not charge the failure to file a tax return as an endeavor" under Section 7212(a)).

unlawful benefits by employing that variety of corrupt methods that is limited only by the imagination of the criminally inclined." *United States* v. *Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991) (citation and internal quotation marks omitted), cert. denied, 503 U.S. 1004 (1992). For example, a defendant who promotes illegal tax-avoidance schemes is plainly obstructing the administration of the tax laws, even though the defendant's lack of knowledge of any particular client's tax situation may preclude prosecution for tax evasion. See *United States* v. *Crim*, 451 Fed. Appx. 196, 200-201 (3d Cir. 2011) (affirming the Section 7212(a) conviction of a defendant who spoke at a "tax evasion seminar" and promoted the unlawful use of trusts to evade income taxes), cert. denied, 132 S. Ct. 2682 (2012). Contrary to petitioner's suggestion (Pet. 15), the statute does not reach "legitimate but aggressive tax avoidance strategies." See C.A. App. 432 (requiring proof beyond a reasonable doubt of a defendant's corrupt "*intent* to secure an *unlawful* advantage or benefit") (emphases added). But it does reach schemes to unlawfully avoid tax liability by hiding assets and destroying records—which is what petitioner was convicted of doing.

3. As petitioner notes (Pet. 11-12), the Sixth Circuit has concluded that Section 7212(a) requires proof of a pending IRS action and the defendant's knowledge of that action. See *Kassouf*, 144 F.3d at 955-958; see also *United States* v. *Miner*, 774 F.3d 336, 344-345 (6th Cir. 2014) (same), cert. denied, 135 S. Ct. 2060 (2015). Every other court of appeals to have considered the issue has rejected the Sixth Circuit's interpretation and has held that the existence a pending IRS action is not required. See Pet. App. 28a (joining

"three of our sister circuits in concluding that [S]ection 7212(a)'s omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation"); see also *Sorensen*, 801 F.3d at 1232 ("[Section] 7212(a) does not require an ongoing proceeding when a defendant corruptly endeavors to obstruct or impede the due administration of the tax laws.") (citation, alterations, and internal quotation marks omitted); *Floyd*, 740 F.3d at 32 & n.4 (same); *United States* v. *Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) (same), cert. denied, 547 U.S. 1132 (2006); cf. *United States* v. *Scheuneman*, 712 F.3d 372, 380 (7th Cir. 2013) (holding that losses resulting from obstructive conduct that predated an IRS investigation were properly included within a restitution award because the obstructive conduct formed a basis for the defendant's conviction under the omnibus clause, "which prohibits all manner of activities which may obstruct or impede the administration of the code") (citation and internal quotation marks omitted). A majority of the circuits that have not expressly considered the question have nevertheless affirmed convictions under the omnibus clause without any indication that the defendants acted in response to a pending IRS action, investigation, or other proceeding.[6]

The disagreement between the Sixth Circuit and other courts of appeals does not warrant this Court's review. Not only is the conflict comparatively thin,

---

[6] See *Crim*, 451 Fed. Appx. at 200; *United States* v. *Phipps*, 595 F.3d 243, 244-245, 247 (5th Cir.), cert. denied, 560 U.S. 935 (2010); *United States* v. *Mitchell*, 985 F.2d 1275, 1276-1279 (4th Cir. 1993); *Popkin*, 943 F.2d at 1536-1537; *United States* v. *Williams*, 644 F.2d 696, 701 (8th Cir.), cert. denied, 454 U.S. 841 (1981).

but the Sixth Circuit has vacillated in its approach. Although it first adopted petitioner's proposed rule in its 1998 decision in *Kassouf*, the court expressly limited that decision "to its precise holding and facts" the following year. *United States* v. *Bowman*, 173 F.3d 595, 600 (1999) (affirming a conviction under Section 7212(a)'s omnibus clause for intentionally attempting to trigger an IRS investigation against third parties). In light of *Bowman*, even district courts within the Sixth Circuit did not thereafter follow *Kassouf*. See, *e.g.*, *United States* v. *Gilbert*, No. 3:09-CR-57, 2009 WL 2382445, at *3 (W.D. Ky. July 30, 2009) ("The most recent guidance from the Sixth Circuit indicates that an IRS action is not required.").

In 2014, however, the Sixth Circuit upset that settled understanding. In *Miner*, the court held that *Kassouf*'s approach remained binding in at least those cases that involve "defendants whose conduct in failing to disclose or in peculiarly structuring their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds." 774 F.3d at 345. The court did not independently analyze that question, however, relying instead on the Sixth Circuit's "first-in-time" rule to hold that insofar as "the rationales of *Kassouf* and *Bowman* conflict, we are bound to follow the former, not the latter." *Id.* at 344-345. Nonetheless, the court affirmed the defendant's conviction on the ground that the failure to instruct the jury about the need for a pending IRS action was "harmless" because "no real dispute" existed at trial that the defendant "acted at least with awareness that the IRS was actively investigating his clients when he engaged in most of his conduct." *Id.* at 346. That resolution made the case

less suitable for rehearing en banc, and the government did not seek further review.

Petitioner contends (Pet. 13) that "[t]here is no possibility of the circuit conflict resolving itself without this Court's intervention." That assertion is incorrect. Defendants convicted under the omnibus clause may challenge on appeal the sufficiency of the evidence establishing knowledge of a pending IRS proceeding. Defendants may also seek to challenge jury instructions: a court could, for example, conclude that *Bowman* continues to control in a case with analogous facts and instruct the jury accordingly, or it could otherwise fail to give an instruction that conforms to *Kassouf*. The government, too, may appeal a district court's pretrial decision to dismiss an indictment for failure to sufficiently allege knowledge of a pending IRS action. See, *e.g.*, *United States* v. *Reed*, 77 F.3d 139, 142 (6th Cir.) (en banc), cert. denied, 517 U.S. 1246 (1996). Any of those circumstances may present the Sixth Circuit with an appropriate opportunity to grant en banc review.

Moreover, several indications suggest that the Sixth Circuit may grant such review in an appropriate case. *Kassouf* was a divided opinion, see 144 F.3d at 960 (Daughtrey, J., concurring and dissenting); the panel in *Bowman* sought to limit *Kassouf* to its facts, see 173 F.3d at 600; and the panel in *Miner* relied on *Kassouf*'s status as binding precedent without endorsing the substance of its reasoning, see 774 F.3d at 344-345. The growing consensus among the circuits that *Kassouf* was wrongly decided provides a further reason for the Sixth Circuit to grant review. See Fed. R. App. P. 35 advisory committee's note (1998) (Amendments) (recognizing that a case "may be a strong

candidate for a rehearing en banc" when "the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict"); cf. *United States* v. *Corner*, 598 F.3d 411, 414 (7th Cir. 2010) (en banc) (noting the importance of en banc review where "th[e] circuit stands alone" on an issue and "can eliminate [a circuit] conflict by overruling a decision that lacks support elsewhere"). The current conflict would best be resolved by the Sixth Circuit's reconsideration of *Kassouf* en banc, without the need for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
DAVID A. HUBBERT
Acting Assistant Attorney General
S. ROBERT LYONS
STANLEY J. OKULA, JR.
GREGORY S. KNAPP
Attorneys

MAY 2017

RECORD
AND
BRIEF

No. 16-1144

IN THE

Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

JOSEPH M. LATONA
Counsel of Record
403 Main Street
716 Brisbane Building
Buffalo, NY 14203
(716) 842-0416
sandyw@tomburton.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONER 1

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) 5

Dean v. United States, 137 S. Ct. 368 (2016) 2

Honeycutt v. United States, 137 S. Ct. 588 (2016) 2

Lockhart v. United States, 136 S. Ct. 958 (2016) 2

Luis v. United States, 136 S. Ct. 1083 (2016) 2

Maslenjak v. United States, 137 S. Ct. 809 (2017) 2

Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) 2

Nichols v. United States, 136 S. Ct. 1113 (2016) 2

Ocasio v. United States, 136 S. Ct. 1423 (2016) 2

Taylor v. United States, 136 S. Ct. 2074 (2016) 2

United States v. Aguilar, 515 U.S. 593 (1995) 5, 6

United States v. Bowman, 173 F.3d 595 (6th Cir. 1999) 3

United States v. Crim, 451 F. App'x 196 (3d Cir. 2011) 3

United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998) 2

United States v. Massey, 419 F.3d 1008 (9th Cir. 2005) 3

United States v. Miner, 774 F.3d 336 (6th Cir. 2014) 3

United States v. Westbrooks, No. 16-20490, __ F.3d __, 2017 WL 2269512 (5th Cir. May 24, 2017) 2

United States v. Wood, 384 F. App'x 698 (10th Cir. 2010) 3

Voisine v. United States, 136 S. Ct. 2272 (2016) 2

STATUTES

26 U.S.C. § 7212(a) ..... *passim*

OTHER AUTHORITIES

Brief in Opposition, *Crim v. United States*, No. 11-8948 (U.S. Apr. 25, 2012) 3

Brief in Opposition, *Massey v. United States*, No. 05-8633 (U.S. Apr. 12, 2006) 4

Brief in Opposition, *Sorenson v. United States*, No. 15-595 (U.S. Jan. 20, 2016), 2016 WL 245461 3

Brief in Opposition, *Wood v. United States*, No. 10-7419 (U.S. Jan. 11, 2011) 3-4

U.S. Dep't of Justice, Criminal Tax Manual § 17.00 (rev. 2016), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf 7

REPLY BRIEF OF PETITIONER

The government does not dispute that the circuits are openly split about whether the residual clause of 26 U.S.C. § 7212(a) requires that the defendant acted with knowledge of a pending IRS action. BIO 14-15. Nor is there any dispute that this petition squarely presents that question. That is ample reason by itself for this Court to grant review. Whether conduct is punishable as a federal felony cannot depend on whether the prosecution takes place in New York instead of Ohio.

But review is also warranted because the government's interpretation of § 7212(a) is as sweeping as it is wrong. In phrasing notable for both its breadth and its candor, the government contends that the administration of the tax code is "continuous, ubiquitous, and universally known to exist," such that any act or omission taken at any time anywhere could be felonious obstruction. BIO 9. As Petitioner, the dissenting judges below, and *amici* have explained, the government's transformation of § 7212(a) into an all-purpose tax crime frustrates Congress's intent, chills legitimate conduct, and runs afoul of this Court's precedents. This Court has not hesitated to curb executive over-reading of criminal statutes in the past, and its review is needed here.

1. The government concedes, as it must, that the interpretation of § 7212(a) is the subject of a circuit split. The government further identifies no vehicle problems that would prevent the Court from resolving that split in this case.

That leaves the government to argue principally that this Court should deny review because the Sixth

Circuit is the only court of appeals on its side of the split. BIO 14-15.[1] That is no basis for denying review. Even with only one appellate court on one side of the split, it is arbitrary and unfair that the same conduct either is, or is not, a federal felony depending on where a person is prosecuted. That is presumably why in the past two Terms alone the Court has granted ten petitions for certiorari in federal criminal cases in which there was only one court on one side of the split.[2]

The government speculates that the Sixth Circuit could resolve the circuit conflict through *en banc* proceedings. The kind of hypothesizing is no answer given that the same could have been said in each of the ten cases enumerated above, and there is a particularly low likelihood that the Sixth Circuit will revisit *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998). The government claims that the Sixth Circuit has

---

[1] As the government noted in its May 25, 2017 letter notifying the Court of supplemental authority, the Fifth Circuit recently sided against the Sixth Circuit on this question, holding that knowledge of a pending IRS action is not required for a violation of § 7212(a). *See United States v. Westbrooks*, No. 16-20490, 2017 WL 2269512 (5th Cir. May 24, 2017). That decision only deepens the circuit conflict.

[2] *See Maslenjak v. United States*, 137 S. Ct. 809 (2017) (4-1 split); *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (5-1 split); *Dean v. United States*, 137 S. Ct. 368 (2016) (4-1 split); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Lockhart v. United States*, 136 S. Ct. 958 (2016) (5-1 split); *Voisine v. United States*, 136 S. Ct. 2272 (2016) (approximately 9-1 split).

"vacillated" in its interpretation of § 7212(a), but the Sixth Circuit recently strongly reaffirmed *Kassouf* while acknowledging that it was solidifying a circuit split in *United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014). Only this Court is positioned to give a uniform construction of § 7212(a).

Finally, the government asserts that the Court previously denied certiorari in four petitions presenting the same question, but those petitions had shortcomings that this petition lacks. In the government's Brief in Opposition to the petition filed in *Sorenson v. United States*, it explained that the question had not been preserved, and any error was likely harmless anyway because the defendant had continued his scheme after he became aware of a pending IRS proceeding. BIO 19-20, *Sorenson v. United States*, No. 15-595, 2016 WL 245461 (U.S. Jan. 20, 2016). Here, there is no waiver and no basis for arguing harmless error.

The other three petitions were submitted before the Sixth Circuit clarified in *Miner* that its interpretation of § 7212(a) conflicts with that of other circuits. *See United States v. Crim*, 451 F. App'x 196 (3d Cir. 2011); *United States v. Wood*, 384 F. App'x 698 (10th Cir. 2010); *United States v. Massey*, 419 F.3d 1008 (9th Cir. 2005). In its briefs in opposition to certiorari in those cases, the government argued that *United States v. Bowman*, 173 F.3d 595 (6th Cir. 1999), which the Sixth Circuit decided before *Miner*, had limited *Kassouf* to its facts, and therefore that there was no circuit conflict warranting the Court's review. BIO 11-13, *Crim v. United States*, No. 11-8948 (U.S. Apr. 25, 2012); BIO 10-

11, *Wood v. United States*, No. 10-7419 (U.S. Jan. 11, 2011); BIO 11-12, *Massey v. United States*, No. 05-8633 (U.S. Apr. 12, 2006). Now, in light of *Miner*, the government does not dispute that there is an entrenched conflict.

In short, this petition squarely presents an acknowledged split over whether Congress has made a broad swath of primary conduct illegal. That split warrants this Court's review.

2. The balance of the government's opposition goes to the merits of its position, and it only confirms the importance of this Court's review. As Petitioner, the dissenters below, and *amici* have explained, the government's sweeping interpretation is incorrect, and the dangers it imposes "are neither imaginary nor hyperbolic." Br. of *Amicus* Am. Coll. of Tax Counsel at 3. None of the government's arguments to the contrary is persuasive.

The government unabashedly embraces the Second Circuit's all-encompassing view of § 7212(a)'s residual clause in which *any* act or omission that somehow, someday makes it harder for the IRS to administer the tax laws can form the basis of a § 7212(a) felony charge, if a prosecutor later believes the act or omission was undertaken with "corrupt" intent. Even failing to maintain a receipt or business record years before any IRS inquiry could be a felony in the government's view because the administration of the tax code is "continuous, ubiquitous, and universally known to exist." BIO 9.

The government argues that the sweep of its interpretation is limited by § 7212(a)'s *mens rea*

requirement that the defendant have acted "corruptly." But this Court has repeatedly construed statutes containing similar *mens rea* requirements narrowly. *See United States v. Aguilar*, 515 U.S. 593, 598-600 (1995); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-05 (2005). The government responds that § 7212(a) requires an "exacting" degree of corruption, BIO 11, but the government's definition of corruption—to "act[] with the intent to secure an unlawful advantage or benefit either for [one]self or for another"—is not "exacting" at all. BIO 5. To the contrary as Judge Jacobs explained, such "corrupt" actions are easy to allege. Pet. App. 45a. And as the tax expert *amici* explain, legitimate tax avoidance advice can be easily recast as corrupt obstruction by an aggressive prosecutor who deems the "advantage" that the advice offers to be "unlawful." Br. of *Amicus* Am. Coll. of Tax Counsel 9-11.

The government also argues that its interpretation is mandated by § 7212(a)'s text. But it has no real answer to this Court's decision in *Aguilar*, which construed a similar statute broadly criminalizing obstruction of the "due administration of justice" to impose a "nexus" requirement. The nexus requirement meant that the government had to prove not just any kind of obstruction of justice, but the defendant's particular "intent to influence judicial or grand jury proceedings." 515 U.S. at 599.

The government contends that the phrase "due administration of justice" in *Aguilar* is narrower than the phrase "due administration of the [tax code]," on the theory that the statutory phrase "due

administration of justice" was derived from earlier statutory language that had expressly limited the provision to judicial proceedings. BIO 8-9. But *Aguilar* did not rest on that argument. Instead, the Court invoked the "restraint" it "traditionally exercised . . . in assessing the reach of a federal criminal statute." 515 U.S. at 600. The reality is that when Congress adopted the residual provision that became part of § 7212(a), it gave no hint that it was seeking to create an all-purpose tax felony ready for use any time an act or omission hinders the "continuous" and "ubiquitous" administration of the tax code. BIO 9. The same "restraint" this Court showed in *Aguilar* is called for here.

Congress's carefully crafted scheme of tax crimes makes particularly clear that Congress did not intend such broad construction of § 7212(a). The government acknowledges that any otherwise-misdemeanor willful failure to file a tax return would satisfy the elements of felony obstruction on its reading, but argues that is unproblematic because the government would, in its discretion, not seek a felony conviction for a failure to file a tax return.

That is no answer.[3] Nor for that matter does the government dispute that its reading would allow every count of tax evasion or fraud to be layered with an additional charge of obstruction. The government's

---

[3] Indeed, *in this very case* the government charged Marinello with § 7212(a) obstruction based on his failure to file a tax return. The government dropped that charge only after Marinello moved to strike it as duplicative of the misdemeanor failure-to-file count. Pet. App. 7a n.1.

interpretation would thereby "serve[] only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted." Pet. App. 46a. The government contends that a broad obstruction statute is necessary to reach corrupt conduct that does not rise to the level of evasion or fraud, but it musters just one case for that proposition. Not only that, the case invoked by the government concerned a defendant who was also convicted for the separate crime of conspiring to defraud the United States under 18 U.S.C. § 371. BIO 14 (citing *United States v. Crim*, 451 F. App'x 196, 200-201 (3d Cir. 2011)). Section 7212(a) does not need to be stretched beyond what Congress intended in order to equip the government to deal with fraudsters.

Finally, the government is wrong when it argues that the Sixth Circuit's construction of § 7212(a)'s residual clause renders the first part of the statute superfluous. BIO 9-10. For one thing, the government has elsewhere taken the position that § 7212(a)'s first clause apparently reaches only *threats* and *forcible* acts aimed at intimidating or impeding federal employees administering the tax code, whereas the residual clause covers "corrupt" acts aimed at obstructing or impeding the administration of the tax code. U.S. Dep't of Justice, Criminal Tax Manual § 17.02 (rev. 2016), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf. Thus, requiring that a defendant undertake a "corrupt" act with knowledge of a pending IRS action in order to convict under § 7212(a)'s residual clause would in no way render the second clause redundant of the first. But even assuming the first clause reaches "corrupt" acts

that endeavor to intimidate or impede a United States officer or employee administering the tax code, B10 10, the residual clause encompasses conduct not covered by the first—such as efforts to collude with an IRS officer to violate the tax laws.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. LATONA
Counsel of Record
403 Main Street
716 Brisbane Building
Buffalo, NY 14203
(716) 842-0416
sandyw@tomburton.com

MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

June 5, 2017

RECORD
AND
BRIEFS

FILED
SEP - 8 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1144

IN THE

Supreme Court of the United States

CARLO J. MARINELLO, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ARMANDO GOMEZ
DAVID W. FOSTER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
202-371-7000

JENNY L. JOHNSON
Counsel of Record
GUINEVERE M. MOORE
JOHNSON MOORE LLC
150 North Wacker Drive
Suite 1250
Chicago, IL 60606
312-549-9990
Jenny.johnson@
jmtaxlitigation.com

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Without a Narrowing Interpretation from this Court, the Residual Clause of § 7212(a) Presents Grave Constitutional Concerns. 4

A. The Residual Clause of § 7212(a) Fails to Give Fair Notice of the Conduct it Punishes 4

B. The Residual Clause of § 7212(a) is So Standardless that it Invites Arbitrary Enforcement. 11

1. Courts have Struggled to Craft Principled and Intelligible Boundaries Around the Residual Clause. 11

2. Prosecutors have Abandoned All Objective Standards Limiting Prosecutions Under the Residual Clause. 18

TABLE OF CONTENTS

Page(s)

II. This Court Should Interpret the Residual Clause of § 7212(a) as a Specialized Tool Within the Tax Enforcement System. 20

A. To Interpret § 7212(a), the Court Must Consider its Role in the Tax Enforcement System..... 21

B. Tethering the Residual Clause to an Existing Proceeding Prevents it from Subsuming the Other Tax Crimes and Provides the Nexus Required for Intent to Obstruct. 24

C. § 7212(a) Must Require Knowledge of Illegality and an Affirmative Act. 27

1. Requiring Knowledge of Illegality as an Element of a Tax Crime is Necessary to Preserve Due Process. 27

2. § 7212(a) Should Not be an Exception to the Rule that Tax Felonies Require an Affirmative Act..... 31

D. Any Broader Reading of § 7212(a) Threatens to Undermine the Tax Enforcement System..... 33

CONCLUSION..... 35

TABLE OF AUTHORITIES

Page(s)

CASES:

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 3, 26

Badaracco v. Commissioner,
464 U.S. 386 (1984) 8

Champlin Ref. Co. v. Corp. Comm'n,
286 U.S. 210 (1932) 10

Cheek v. United States,
498 U.S. 192 (1991) 27, 28, 29

Clark v. Martinez,
543 U.S. 371 (2005) 20, 21

Johnson v. United States,
135 S. Ct. 2551 (2015) 4, 11, 18

McDonnell v. United States,
136 S. Ct. 2355 (2016) 19, 20

McNally v. United States,
483 U.S. 350 (1987) 21

Pettibone v. United States,
148 U.S. 197 (1893) 26

Skilling v. United States,
561 U.S. 358 (2010) 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 3, 26

Badaracco v. Commissioner,
464 U.S. 386 (1984) 8

Champlin Ref. Co. v. Corp. Comm'n,
286 U.S. 210 (1932) 10

Cheek v. United States,
498 U.S. 192 (1991) 27, 28, 29

Clark v. Martinez,
543 U.S. 371 (2005) 20, 21

Johnson v. United States,
135 S. Ct. 2551 (2015) 4, 11, 18

McDonnell v. United States,
136 S. Ct. 2355 (2016) 19, 20

McNally v. United States,
483 U.S. 350 (1987) 21

Pettibone v. United States,
148 U.S. 197 (1893) 26

Skilling v. United States,
561 U.S. 358 (2010) 20

TABLE OF AUTHORITIES

Page(s)

Spies v. United States,
317 U.S. 492 (1943).....22, 23, 31

United States v. Aguilar,
515 U.S. 593 (1995)..... 12, 26

United States v. Bishop,
412 U.S. 346 (1973)..... 28

United States v. Bowman,
173 F.3d 595 (6th Cir. 1999).....13, 14, 26, 27

United States v. Dean,
487 F.3d 840 (11th Cir. 2007)..... 30

United States v. Floyd,
740 F.3d 22 (1st Cir. 2014) 15

United States v. Giambalvo,
810 F.3d 1086 (8th Cir. 2016)..... 17

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998).....12, 13, 14, 26

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998) 4, 29, 30

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) .....*passim*

TABLE OF AUTHORITIES

Page(s)

United States v. Marinello,
855 F.3d 455 (2d Cir. 2017) 33

United States v. Massey,
419 F.3d 1008 (9th Cir. 2005) 15

United States v. Miner,
774 F.3d 336 (6th Cir. 2014) 14, 26, 27

United States v. Popkin,
943 F.2d 1535 (11th Cir. 1991) 4, 16

United States v. Reeves,
752 F.2d 995 (5th Cir. 1985) 11, 15, 16

United States v. Saldana,
427 F.3d 298 (5th Cir. 2005) 4, 30

United States v. Sorensen,
801 F.3d 1217 (10th Cir. 2015) ..... *passim*

United States v. Sun-Diamond Growers,
526 U.S. 398 (1999) 20

United States v. Walasek,
527 F.2d 676 (3d Cir. 1975) 26

United States v. Williams,
644 F.2d 696 (8th Cir. 1981) 12, 18

TABLE OF AUTHORITIES

Page(s)

United States v. Williamson,
746 F.3d 987 (10th Cir. 2014) 29, 30

United States v. Wood,
384 F. App'x 698 (10th Cir. 2010) 32

U.S. Civil Service Comm'n v. Letter Carriers,
413 U.S. 548 (1973) 20

Yates v. United States,
135 S. Ct. 1074 (2015) 11, 21

STATUTES AND REGULATIONS:

18 U.S.C. § 1503 ..... 12, 16, 25

26 U.S.C. § 7201 24

26 U.S.C. § 7202 23

26 U.S.C. § 7203 ..... 24, 25, 32

26 U.S.C. § 7206(1) 24, 27

26 U.S.C. § 7206(2) 24

26 U.S.C. § 7212 ..... 12, 16, 32

26 U.S.C. § 7212(a) ..... *passim*

TABLE OF AUTHORITIES

Page(s)

26 U.S.C. § 7215 24

31 C.F.R. § 10.21 8

Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 855 ..... 11, 25

RULES:

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES:

Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. Kan. L. Rev. 847 (1999) 7

Department of Justice Tax Division, Directive No. 77 (1989), *superseded by* Directive No. 129 (2004) 18, 19

John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 Fordham L. Rev. 2721 (2016) 6

Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681 (1997) 7

TABLE OF AUTHORITIES

Page(s)

Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. Rev. Online 152 (2015) 35

U.S. Dep't of Justice, Criminal Tax Manual § 2.00 (2012), https://www.justice.gov/sites/default/files/tax/legacy/2015/03/27/CTM%20Chapter%202.pdf 34

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner Carlo J. Marinello, II.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;

---

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

Effective tax enforcement requires uniform, predictable and comprehensible distinctions between lawful business practices and felonies. The College submits this *amicus* brief because it is deeply concerned that the lower courts' unbounded reading of the residual clause in 26 U.S.C. § 7212(a) erases those distinctions and impermissibly shifts the power to define criminal liability to prosecutors. Narrowed appropriately, the residual clause in § 7212(a) has a specialized role to play in combating obstruction of tax enforcement. Read broadly, it threatens principles at the foundation of our system of justice and creates undue risk for both taxpayers and Fellows of the College who have devoted their careers to helping taxpayers navigate the tax laws.

SUMMARY OF ARGUMENT

The Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citation omitted). Desire to ensure fair warning and deference to Congress coincide to point unequivocally in the direction of a narrow reading of the residual clause of § 7212(a).

The unbounded reading of § 7212(a) espoused by the Government and adopted by the court below deprives taxpayers and their advisors of fair notice of the conduct it punishes, and invites arbitrary enforcement by prosecutors empowered with vast discretion. These potential constitutional infirmities militate in favor of a narrow reading of § 7212(a) that recognizes its specialized role in the comprehensive tax enforcement system enacted by Congress and adopts the safeguards that Congress and the courts have developed to ensure due process in prosecutions for tax crimes and obstruction of justice.

Narrowed appropriately, § 7212(a) is a tool to combat interference with an identifiable tax enforcement activity by a defendant who commits an affirmative act to obstruct or impede with knowledge of that activity and intent to gain an advantage he knew to be unlawful. Any broader reading would implicate constitutional principles and eviscerate the

comprehensive tax enforcement system Congress enacted.

ARGUMENT

I. Without a Narrowing Interpretation from this Court, the Residual Clause of § 7212(a) Presents Grave Constitutional Concerns.

The Court recently confirmed that the Government violates the guarantee of due process "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). The unbounded reading of the residual clause espoused by the Government and adopted by the court below has both vices of a vague statute.

A. *The Residual Clause of § 7212(a) Fails to Give Fair Notice of the Conduct it Punishes.*

The residual clause of § 7212(a) makes it a felony to "in any other way corruptly . . . obstruct[ ] or impede[ ], or endeavor[ ] to obstruct or impede, the due administration of this title." The lower courts have defined "corruptly" to mean "with intent to gain an unlawful advantage or benefit either for oneself or another." *See, e.g.*, *United States v. Sorensen*, 801 F.3d 1217, 1224 (10th Cir. 2015); *United States v. Saldana*, 427 F.3d 298, 305 (5th Cir. 2005); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991). Taking false comfort from the "corruptly"

mens rea requirement, the Second Circuit in the decision below refused to limit the scope of § 7212(a) to interference with a pending Internal Revenue Service ("IRS") action of which the defendant was aware, and found that no affirmative act is necessary for this felony. *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016). Read that broadly, § 7212(a) criminalizes *any* act or omission that could potentially make *any* aspect of the IRS's job harder in *any* way as long as the defendant committed the act or omission with an intent to gain an unlawful benefit—whether or not the defendant knew the benefit was unlawful, whether or not the act or omission was itself a lawful act, whether or not the defendant acted deceitfully, whether or not the defendant could foresee any nexus between the act or omission and the IRS, and whether or not the act or omission occurred within the adversarial process.

The Government argues that "unlike justice administered in a court proceeding—which is a defined, discrete event—tax administration is continuous, ubiquitous, and universally known to exist." Resp't's Br. in Opp'n at 9. It is precisely this continuous, ubiquitous, and universal nature of tax administration that renders an unbounded interpretation of the residual clause of § 7212(a) unconstitutionally vague. In administering the tax code, the IRS plays every conceivable role: lawmaker when it promulgates regulations and rulings; administrator when it processes returns and payments; investigator when it conducts civil audits or criminal investigations; settlement officer when the Office of Appeals considers a disagreement between the taxpayer and examiner; litigator when

attorneys in the Office of Chief Counsel represent the IRS in adversarial court proceedings; decision-maker when it rules on Private Letter Ruling requests; and ethics board when it creates rules for practice before the IRS and enforces those rules through its Office of Professional Responsibility. Countless otherwise lawful acts or omissions could impede the IRS in one of its myriad roles. By giving prosecutors the discretion to convert any one of those countless acts or omissions into a federal felony, the residual clause violates the Constitution's prohibition on vague criminal laws.

Tax lawyers, including Fellows of the College, face an especially heightened risk of wrongful prosecution without fair notice under the residual clause of § 7212(a). Tax lawyers owe duties of confidentiality and zealous advocacy to their clients that often compete with an ill-defined duty to the tax system that may morph depending on whether the lawyer is engaged in tax planning, audit defense, litigation or any other type of interaction with the IRS. Defining the duties owed to the IRS in each context, and striking the right balance between those duties and often conflicting duties owed to taxpayer clients, is no easy feat. Indeed, the scope of these duties and appropriate resolution of the inevitable conflicts between them are the subject of significant dispute and consternation.[2] These are

---

[2] *See, e.g.*, John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 Fordham L. Rev. 2721, 2725 (2016) (describing the longstanding debate over the tax lawyer's role and arguing that, although the lawyer has a duty to the

(cont'd)

muddy waters for even the most experienced tax lawyers, and the Second Circuit's reading of § 7212(a) gives prosecutors the unfettered right to decide that a lawyer's attempt to strike the right balance was not only erroneous, but may be charged as felony obstruction. Tax lawyers already forced to sail through Scylla and Charybdis to comply with their ethical obligations should not face the additional threat of felony prosecution on one side of the strait.

Without a narrowing interpretation of § 7212(a), the line between effectively representing a taxpayer and what a prosecutor could charge as corruptly impeding the IRS is nonexistent. For example, when handling an audit, the taxpayer's lawyer may discover that the taxpayer underpaid his tax. In our adversarial system of justice, there is no duty imposed on the lawyer to expose flaws in the taxpayer's returns or recordkeeping during an IRS audit. Indeed, the lawyer is obligated to preserve the confidentiality of information shared by the taxpayer within the attorney-client privilege and to

---

(cont'd from previous page)
system, "concrete guidance" on the scope of that duty is needed); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. Kan. L. Rev. 847, 851 (1999) (recognizing the contested question of how a tax lawyer's duties conflict and arguing that there is no discrete duty by the lawyer to the tax system); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681, 687-88 (1997) (taking the position that when a lawyer's two duties collide, the duty to the system takes priority).

help the taxpayer minimize his exposure for additional tax and criminal or civil penalties to the extent she can do so within her ethical obligations. As interpreted by the Second Circuit, however, § 7212(a) authorizes felony prosecution for an omission that impedes the administration of the tax code if it is committed with intent to gain an unlawful advantage for oneself or another. Is the tax lawyer's failure to notify the IRS of her client's tax deficiency, committed with intent to gain an unlawful advantage for her client in the form of a lower tax liability, a felony under § 7212(a)?

Similarly, what risk might a tax lawyer (or her client) face when the newly retained tax lawyer discovers through a review of the client's financial records and previously filed tax returns that certain items of income were not properly reported on those returns? Treasury regulations counsel that the tax lawyer who knows that her client has not complied with the tax laws, or has made an error or omission in his return, must "advise the client promptly of such noncompliance, error, or omission" and "the consequences . . . of such noncompliance, error, or omission." 31 C.F.R. § 10.21. This Court has held that the tax code does not require the filing of amended returns. *Badaracco v. Commissioner*, 464 U.S. 386, 397 (1984). If the tax lawyer explains the law to her client and the client elects not to amend his returns in the hope that the IRS does not select his returns for examination, can the lawyer or her client be prosecuted under § 7212(a) for such failure to act?

Consider also that tax lawyers handling IRS audits routinely receive requests for an interview of

the taxpayer. Participating in that interview is often not in the taxpayer's best interests, and an effective lawyer would advise the client of the risks of an interview and then attempt to avoid it. Is it a violation of § 7212(a) for the lawyer to stall the auditor and avoid scheduling the interview? Is it a violation of § 7212(a) to schedule the interview, but advise the taxpayer to assert his Fifth Amendment privilege against self-incrimination throughout the interview? Either way, the tax lawyer is impeding the IRS in its effort to administer the tax code, and doing so with the intent to gain an unlawful advantage for her client in the form of a lower tax liability. There is nothing in § 7212(a) to distinguish deceitful dodging from honest stalling, or to differentiate protection of Constitutional privileges from other kinds of stonewalling.

Similar obstruction of the IRS happens routinely in the normal course of litigation between taxpayers and the IRS. Indeed, the central issue in tax litigation is typically whether the taxpayer was entitled to the reduced tax liability he claimed, or whether the reduction was an "unlawful benefit." If, at the conclusion of the litigation, the court finds that the taxpayer's correct tax liability was higher than he reported on his return, is everything the taxpayer and his lawyer did to impede the IRS in its effort to win the case—such as objecting to interrogatories or disputing requests to admit—suddenly a felony in hindsight? Nothing in § 7212(a) carves out actions taken in the course of litigation maintained in good faith.

In addition to the risks of wrongful prosecution arising from adversarial interactions with the IRS,

there are also countless actions or omissions that could trigger a prosecution under § 7212(a) even though the eventual impact on the IRS is both unforeseen and unforeseeable. For example, a small restaurant may store its register tapes and other records in the basement. If, when installing a new freezer, the owner's son runs the electrical wires himself to avoid the cost of hiring a licensed electrician, he will have acted with intent to secure an unlawful benefit for the restaurant in the form of money saved by not complying with the local building code. If a fire caused by the faulty wiring destroys the register tapes and other records, and the IRS subsequently audits the restaurant, the lack of records would impair the IRS's ability to examine the restaurant's income. The restaurant owner's son, therefore, could be prosecuted under the residual clause of § 7212(a) because actions he took with intent to gain an unlawful benefit for the restaurant impeded the administration of the tax code. Although local building codes are certainly important, a failure to comply should not become a federal felony simply because it kicks off a chain of events that makes the IRS's job harder at some point in the future.

As this Court recognized long ago, "[i]t is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 243 (1932) (citations omitted). Under the reading espoused by the Government and adopted by the court below, the residual clause of § 7212(a) is really no rule or standard at all, yet it touches "every

aspect of economic life." *United States v. Reeves*, 752 F.2d 995, 999 (5th Cir. 1985). Such a pervasive yet simultaneously indefinite criminal statute does not pass Constitutional muster.

B. *The Residual Clause of § 7212(a) is So Standardless that it Invites Arbitrary Enforcement.*

In addition to failing to give ordinary people—or even highly educated tax lawyers—fair notice of what conduct is proscribed, the residual clause of § 7212(a) impermissibly shifts the balance of power "between 'the legislature, the prosecutor, and the court in defining criminal liability.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). Like the residual clause in *Johnson*, the residual clause in § 7212(a) "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2258. In *Johnson*, the Court found that "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.* The lower courts have been unable to define any consistent, intelligible boundaries for § 7212(a) and the Government has progressively abandoned all objective standards it previously applied in self-restraint.

1. *Courts have Struggled to Craft Principled and Intelligible Boundaries Around the Residual Clause.*

Although § 7212(a) was enacted with the Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat.

855, the Government refrained from using the residual clause for over twenty-five years. In the first reported appellate decision interpreting the residual clause, the court noted that it could find no other cases brought by the Government and would, therefore, "proceed cautiously where for over twenty-five years the Government has feared to tread." *United States v. Williams*, 644 F.2d 696, 699 (8th Cir. 1981). In *Williams*, the government acknowledged that it had previously asserted that § 7212 applied only to situations involving force or threats of force, but characterized that position as "timid" and sought a more expansive interpretation of the statute. *Id.* at 699 n.12. The court in *Williams* agreed, finding that "the broad language of section 7212's omnibus clause demands a correspondingly broad construction." *Id.* at 700. Since then, the Government's continuing efforts to expand the scope of § 7212(a) have met with some trepidation from the lower courts, but no uniform, predictable, or comprehensible limits on prosecutorial discretion.

The Court of Appeals for the Sixth Circuit has made the most progress toward articulating an intelligible boundary on the scope of § 7212(a). Relying heavily on this Court's interpretation of 18 U.S.C. § 1503 in *United States v. Aguilar*, 515 U.S. 593 (1995), and observing that the residual clause in § 7212(a) contains language virtually identical to § 1503, the Sixth Circuit construed the omnibus clause as requiring proof that a defendant was aware of "some pending IRS action" when he engaged in the potentially impeding conduct. *United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998). The

Kassouf court correctly expressed concern that broader application of § 7212(a) could "open[ ] the statute to legitimate charges of overbreadth and vagueness" and reluctance to construe the statute to impose criminal liability on a defendant who "may have no idea that conduct such as the failing to maintain records (before his tax returns were ever filed) might obstruct IRS action because he had no specific knowledge that the IRS would ever investigate his activities." *Id.* at 958.

The following year, a different panel of the Sixth Circuit held that *Kassouf* should be limited to its precise holding and facts, and that § 7212(a) may apply to defendants who anticipatorily try to impede the administration of the internal revenue laws before the pendency of any IRS proceeding. *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999). In *Bowman*, the defendant was prosecuted under § 7212(a) after he attempted to prompt an IRS investigation into several of his creditors by filing forms with the IRS that falsely indicated that his creditors had received taxable income. *Id.* at 599. The court opined that "[a]ll of the reasoning in *Kassouf* supports the conclusion that an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within § 7212(a)'s proscribed conduct," and differentiated the two cases factually on the grounds that "[t]he filing of false tax forms is not legal when undertaken; it is not speculative; it is specifically designed to cause a particular action on the part of the IRS." *Id.* at 600.

Most recently, the Sixth Circuit found that "although *Bowman* purported to limit *Kassouf* to its facts, it would be more accurate to conclude that the opposite is true." *United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014). As explained by the court in *Miner*, *Kassouf* applies to defendants whose conduct in failing to disclose or in peculiarly structuring their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds," *id.* at 345 (citing *Kassouf*, 144 F.3d at 953), while *Bowman* "is reducible to a rule that a defendant who intentionally attempts to instigate a frivolous IRS proceeding cannot claim to have lacked the necessary intent to impede the IRS's administration of its statutory duties with respect to that proceeding." *Id.* (citing *Bowman*, 173 F.3d at 600). The court found, therefore, that the government erred in characterizing "*Kassouf* as an exception to *Bowman*, rather than the other way around." *Id.* at 344. In an effort to reconcile the two earlier decisions, the *Miner* court noted that "*Bowman*, in rejecting *Kassouf*'s application to a defendant who was attempting to instigate a frivolous IRS proceeding rather than to impede a preexisting one, did so primarily because it believed that the indicia of intent to impede were patently obvious." *Id.*

The state of the law in the Sixth Circuit, therefore, appears to be that the government must prove that the defendant was aware of a specific IRS action at the time of the potentially impeding conduct, unless the intent to impede is "patently obvious." Rules with undefined and inarticulable exceptions are no longer rules, and cannot transform

an unconstitutionally vague criminal law into one that complies with the Due Process Clause.

Moreover, the Sixth Circuit's efforts to define some boundary around § 7212(a) have met with disagreement from every other circuit that has considered the issue. *Marinello*, 839 F.3d 209; *United States v. Sorensen*, 801 F.3d 1217 (10th Cir. 2015); *United States v. Floyd*, 740 F.3d 22 (1st Cir. 2014); *United States v. Massey*, 419 F.3d 1008 (9th Cir. 2005). Refusing to impose any similar boundaries on prosecutions under § 7212(a), the other courts misguidedly rely on the "corruptly" *mens rea* to differentiate lawful conduct from felony obstruction. *Marinello*, 839 F.3d 209, 222 ("[O]ther courts . . . have decided that section 7212(a)'s '*mens rea* requirement' sufficiently 'restricts the omnibus clause's reach. . . .'" (citing *Miner*, 744 F.3d at 347)).

In *United States v. Reeves*, 752 F.2d 995 (5th Cir. 1985), the court noted that it had "upheld section 1503 as not unconstitutional on vagueness grounds largely because the statute covers only actions related to pending judicial proceedings, thus providing adequate notice to potential violators." *Id.* at 999 (citing *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978)). The court recognized, however, that the "narrow circumstances in which section 1503 applies have no parallel in cases involving section 7212(a)" because the IRS "is permitted great power to intrude on, and investigate virtually every aspect of economic life to effect its purpose of administering the tax laws." *Id.* at 999. The court, therefore, sought to provide the notice required for due process by construing the statutorily-undefined "corruptly" *mens rea*. The

court found no cases interpreting the word "corruptly" in § 7212, so it looked to a case construing the term in § 1503 and the legislative history of § 7212 to craft a definition. Drawing on a Senate report that provided one example of what the statute meant by "corruptly endeavor," the court found that the example—corrupt solicitation—was a paradigm of a corrupt endeavor. *Id.* at 1000-01. The court, therefore, defined "'corruptly' endeavoring to impede or obstruct Title 26 as forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another." *Id.* at 1001.

Subsequent decisions adopting this definition shed light on the persisting lack of clarity in § 7212(a). For example, in *United States v. Sorensen*, the defendant used trusts to reduce his taxable assets, and insisted at trial that he did not know that the use of the trusts or the reduction in his tax liability was unlawful. 801 F.3d at 1229-30. The district court refused to give the defendant's requested jury instruction that to find him guilty, the jury must find that he knew the use of the trusts was illegal. *Id.* at 1229. The Tenth Circuit affirmed, finding that it need not decide whether the definition of corruptly requires knowledge of illegality. *Id.* at 1230.

While leaving open the question of whether § 7212(a) requires that the defendant knew that the benefit he sought was unlawful, the courts have found that the defendant need not have committed any unlawful act because "an otherwise lawful act could violate the statute by being carried out for a corrupt purpose or in a corrupt manner." *United States v. Popkin*, 943 F.2d 1535, 1538 (11th Cir.

1991) (affirming conviction of an attorney who formed a domestic corporation). Moreover, the unlawful benefit need not have any relationship to tax administration, or even constitute a financial benefit. *United States v. Giambalvo*, 810 F.3d 1086, 1098 (8th Cir. 2016) (rejecting the argument that "the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage" (quoting *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992))). In other words, a lawful act committed with intent to secure any sort of economic or non-economic benefit that turns out to be unlawful—even if the defendant had no knowledge of illegality—is sufficient for prosecution under § 7212(a) as it has been interpreted by the lower courts.

Finally, in the decision below, the Second Circuit eliminated any vestige of a limitation on the scope of § 7212(a) by not only disavowing the Sixth Circuit's pending action requirement, but by announcing that § 7212(a)—unlike every other tax felony—requires no affirmative act by the defendant. The court acknowledged that "the scope of omissions on which an omnibus clause violation could be based is not limitless," but provided no other guidance about where that line might be drawn. *Marinello*, 839 F.3d at 225 n.15 (citing *United States v. Wood*, 384 F. App'x 698, 708 (10th Cir. 2010)). Instead, the court simply concluded that "[w]hatever those limits may be, the omissions at issue here do not exceed them." *Id.* at 225 n.15.

Prosecutions under the residual clause of § 7212(a) are a morass of uncertainty because the lower courts have failed to articulate any principled,

intelligible, and predictable boundaries on its scope. As in *Johnson*, "the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause." 135 S. Ct. at 2562.

2. *Prosecutors have Abandoned All Objective Standards Limiting Prosecutions Under the Residual Clause.*

After rejecting its previous "timid" interpretation of § 7212(a) in 1981, *Williams*, 644 F.2d at 699, the Government has steadily expanded its interpretation of the residual clause, abandoning all objective criteria it previously used to define when a prosecutor could charge a violation of § 7212(a). In 1989, the Department of Justice Tax Division issued Directive No. 77, which stated:

> In general, the use of the "omnibus" provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed—typically conduct designed to impede or obstruct an audit or criminal tax investigation. . . . However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties.

This policy provided at least some intelligible boundaries: the residual clause of § 7212(a) could be used to charge obstructive conduct after a tax return was filed, which by nature typically involves an audit or investigation, or large-scale obstructive conduct involving liabilities of third parties, which

by nature foreseeably impacts the administration of the tax laws. In both situations, there would be a nexus between the conduct at issue and the due administration of the tax laws that was not wholly speculative.

That directive, however, was superseded in 2004 by Directive No. 129, which instead instructs prosecutors that:

> A § 7212(a) omnibus clause charge is particularly appropriate for corrupt conduct that is intended to impede an IRS audit or investigation. . . .
>
> A § 7212(a) omnibus clause charge can also be authorized in appropriate circumstances to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties.

The notion that the residual clause of § 7212(a) should be reserved for conduct occurring after a tax return has been filed disappeared entirely from the policy in 2004. This policy shift significantly broadened the potential for abuse by individual prosecutors because it opened the door to prosecutions where there was no foreseeable nexus between the defendant's conduct and the administration of the tax laws, and to prosecutions for felony obstruction based on conduct described elsewhere in the code as a misdemeanor.

The Government's continuous expansion of its own reading of § 7212(a) illustrates the difficulty of defining intelligible boundaries around the residual clause and underscores that the Court "cannot

construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010)); *see also United States v. Sun-Diamond Growers*, 526 U.S. 398, 408 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions). Rather, this Court should either give the lower courts the necessary guidance to interpret § 7212(a) uniformly by crafting articulable, objective boundaries around the residual clause, or let Congress fill the void with an appropriately drafted statute.

II. This Court Should Interpret the Residual Clause of § 7212(a) as a Specialized Tool Within the Tax Enforcement System.

If this Court chooses to save the residual clause from constitutional infirmity, principles of statutory interpretation demand a narrow reading of § 7212(a) as a specialized tool within the tax enforcement system. This Court has previously recognized that when a statute's constitutionality is in doubt, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *U.S. Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973); *see also Skilling v. United States*, 561 U.S. 358, 403 (2010). The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-382

(2005) (citing *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), and *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The canon is a "means of giving effect to congressional intent, not of subverting it." *Id.* at 382. In addition, under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court should] choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted).

The Court can honor the rule of lenity and give effect to Congressional intent by recognizing that § 7212(a) is a specialized tool within the comprehensive tax enforcement system designed by Congress and that the safeguards Congress and the courts adopted to ensure due process in prosecutions for tax crimes and obstruction of justice apply equally to § 7212(a).

A. *To Interpret § 7212(a), the Court Must Consider its Role in the Tax Enforcement System.*

In *Yates v. United States*, 135 S. Ct. 1074 (2015), the plurality, concurrence, and dissent all agreed that statutory terms should be interpreted "in their context and with a view to their place in the overall statutory scheme." *Id.* at 1092 (Kagan, J., dissenting) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Members of the Court disagreed about which direction the context pointed in that case, but uniformly embraced the approach of looking to how the provision at issue fit

in the overall statutory scheme. When interpreted in context and with a view to its place in the overall statutory scheme, it is readily apparent that Congress intended § 7212(a) to perform a specific role within the tax enforcement system rather than to serve as a catchall felony for prosecutors to use at their whim.

Interpreting tax crimes by looking at their role in the structure of sanctions imposed by Congress is nothing new. Indeed, when called upon to interpret the felony offense of tax evasion, the Court looked to "its context in the revenue laws." *Spies v. United States*, 317 U.S. 492 (1943). As the Court explained in *Spies:*

> Congress has imposed a variety of sanctions for the protection of the system and the revenues. The relation of the offense of which this petitioner has been convicted to other and lesser revenue offenses appears more clearly from its position in this structure of sanctions.

Id. at 495. The Court described the escalating civil penalties corresponding to different levels of intent, the misdemeanor for willful failure to pay tax when due, and the tax evasion felony at the "climax" of available sanctions. Acknowledging that the "difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define," the Court sought to distinguish them because "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the

same derelictions it had just defined . . . as a misdemeanor." *Id.* at 497.

The *Spies* Court found the distinction between the misdemeanor and the felony in the "affirmative action implied from the term 'attempt', as used in the felony." *Id.* at 498. As explained by the Court:

> We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Id. at 499. The distinction between the tax misdemeanors and felony evasion crafted by the Court in *Spies* remains a core principle at the heart of the tax enforcement system.

The tax enforcement system enacted by Congress and interpreted by the courts creates uniform, predictable, and comprehensible distinctions between lawful conduct, misdemeanors, and felonies. With very few well-defined and limited exceptions for taxpayers in special roles, [3] the tax felonies

---

[3] There are two types of willful failures to act that Congress specifically chose to treat as felonies rather than misdemeanors: the willful failure of a withholding agent to collect, account for, and pay over tax, which is a felony under § 7202, and the willful failure of a person *(cont'd)*

require willful commission of an affirmative act. *See* 26 U.S.C. § 7201 (tax evasion), § 7206(1) (filing a fraudulent return), § 7206(2) (aiding and assisting in preparation of a false return). The common failures to act—failure to pay tax, failure to file a return, failure to keep records, and failure to supply information—are all misdemeanors under 26 U.S.C. § 7203. When viewed in context, it becomes apparent that the Government's sweeping interpretation of § 7212(a) would make it an outlier in an otherwise coherent tax enforcement system and subvert Congressional intent.

B. *Tethering the Residual Clause to an Existing Proceeding Prevents it from Subsuming the Other Tax Crimes and Provides the Nexus Required for Intent to Obstruct.*

Given the care that both Congress and the courts have devoted to refining uniform, predictable, and

---

(cont'd from previous page)
engaged in a trade or business to comply with the currency transaction reporting requirements, which is a felony under § 7203. There is also one misdemeanor in the tax code that does not specifically require willfulness, but incorporates knowledge of illegality into the intent standard in a different way. If a person required to collect, account for, and pay over tax fails to do so, and receives a hand-delivered notice of such failure and the requirement to withhold and pay over additional taxes, continued failure to comply constitutes a misdemeanor under § 7215. In each of these situations, the taxpayer subject to enhanced penalties has special duties prescribed by Congress.

comprehensible distinctions between lawful conduct, misdemeanors, and felonies in the tax enforcement system, Congress could not have intended the residual clause of § 7212(a) to abrogate that entire system. On the contrary, § 7212(a) was enacted alongside the other specifically-defined tax crimes and civil penalties in a comprehensive overhaul of the Internal Revenue Code in 1954. Pub. L. No. 83-591, 68A Stat. 855. It is nonsensical to imagine that Congress decided in one breath that willful failure to file tax returns would be a misdemeanor under § 7203, and in the next breath that the same conduct could constitute a felony under § 7212(a).

For § 7212(a) to make any sense at all in the context of the tax enforcement structure, it must be a specialized tool to combat interference with an identifiable enforcement activity as opposed to a catchall felony that prosecutors could charge as an alternative or supplement to every one of the specifically-defined tax crimes. The statute contains two parallel clauses: one that criminalizes interference with an identifiable IRS agent performing her duties, and one that criminalizes interference with an identifiable enforcement action "in any other way." There must be a nexus between the corrupt endeavor undertaken by the defendant and an identifiable enforcement activity of which the defendant was aware.

Interpreting other obstruction statutes, this Court has consistently required a nexus between the defendant's conduct and a particular proceeding. Interpreting the predecessor to § 1503, the Court required the government to prove not just that the defendant's actions hindered law enforcement

generally, but that the defendant intended to hinder a pending judicial proceeding. *Pettibone v. United States*, 148 U.S. 197, 206 (1893). As explained by the Court, "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." *Id.* The Court subsequently clarified that requirement in *United States v. Aguilar*, 515 U.S. 595 (1995), finding that the defendant's "act must have a relationship in time, causation, or logic with the judicial proceedings." *Id.* at 599 (citing *United States v. Wood*, 6 F.3d 692 (10th Cir. 1993); *United States v. Walasek*, 527 F.2d 676, 679 & n.12 (3d Cir. 1975)). As in *Pettibone*, the *Aguilar* court found that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* at 599. *See also Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (requiring a nexus between persuasion to destroy documents and a "particular official proceeding").

To avoid subsuming the specific tax crimes Congress enacted simultaneously with § 7212(a), and to acknowledge that a taxpayer cannot intend to obstruct tax enforcement activity he knows nothing about, it is necessary to interpret the residual clause as applying to a particular enforcement activity of which the defendant had knowledge at the time of the allegedly impeding conduct.[4]

---

[4] In *Miner*, the Sixth Circuit attempted to reconcile its prior decisions in *Kassouf* and *Bowman*, noting that the

(cont'd)

C. *§ 7212(a) Must Require Knowledge of Illegality and an Affirmative Act.*

1. *Requiring Knowledge of Illegality as an Element of a Tax Crime is Necessary to Preserve Due Process.*

This Court has repeatedly recognized that the complexity of the tax laws justifies a departure from the *mens rea* standard that is sufficient for other crimes. In the seminal case of *Cheek v. United States*, 498 U.S. 192 (1991), the Court explained:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. . . .

(cont'd from previous page)
defendant in *Bowman* was "attempting to instigate a frivolous IRS proceeding rather than to impede a preexisting one." *United States v. Miner*, 774 F.3d 336, 344 (2014). This effort to attempt to reconcile the decisions would not have been necessary had the *Bowman* court instead considered the proper role of § 7212(a) in the tax enforcement system; the defendant in *Bowman* was convicted of a felony under § 7206(1) for willfully filing false documents with the IRS, so the additional charge under § 7212(a) was not necessary to punish the defendant for the very acts on which the Sixth Circuit upheld that charge.

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

Id. at 199-200 (citing *United States v. Smith*, 5 Wheat. 153, 182 (1820) (Livingston, J., dissenting)); *Barlow v. United States*, 7 Pet. 404, 411 (1833); *Reynolds v. United States*, 98 U.S. 145, 167 (1879); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); and O. Holmes, The Common Law 47-48 (1881)); *see also United States v. Bishop*, 412 U.S. 346, 360-61 (1973) (requiring knowledge of illegality because "[i]n our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law [and] it is not the purpose of the law to penalize frank difference of opinion or innocent errors." (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943))).

The reasons this Court has articulated for reading the term "willfully" to require knowledge of

illegality in the criminal tax context apply equally to the term "corruptly" in § 7212(a). The lower courts have expressed reluctance "to add the word 'willfully' to section 7212(a), where Congress has seen fit to omit it," *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998), but that misses the point. There is no statutory definition of "willfully" or "corruptly" in Title 26. Rather, the understanding that the term "willfully" connotes a voluntary, intentional violation of a known legal duty arose out of this Court's jurisprudence "due to the complexity of the tax laws." *Cheek*, 498 U.S. at 200. There is nothing in § 7212(a) that lessens the complexity of the tax laws or justifies a departure from this Court's long-established precedent that a person can only be guilty of a tax crime if the Government can prove that the law imposed a duty on the defendant *and* the defendant knew of that duty.

As described above, the standard definition of "corruptly" adopted by the lower courts is to "act with the intent to gain an *unlawful* advantage or benefit either for oneself or for another." *United States v. Williamson*, 746 F.3d 987, 990 (10th Cir. 2014). No circuit court has decided whether proof that the advantage or benefit was unlawful is sufficient, or whether the Government must prove that the defendant knew that the advantage or benefit was unlawful. The Court of Appeals for the Tenth Circuit has twice elected to avoid the question of "whether a conviction under § 7212(a) requires that the defendant knew that the advantage or benefit sought was unlawful," *Sorensen*, 801 F.3d 1217, 1229 (10th Cir. 2015) (quoting *Williamson*, 746 F.3d 992), finding instead in *Williamson* that any

error in the jury instruction was not "plain," and in *Sorenson* that the enhanced jury instruction given in that case did incorporate a knowledge of illegality requirement. *Williamson*, 746 F.3d at 991-93; *Sorensen*, 801 F.3d at 1230 (approving instruction that to act corruptly, the defendant must have acted "knowingly and dishonestly, with the specific intent to gain an unlawful advantage or benefit either for oneself or for another by subverting or undermining the due administration of the internal revenue laws."); *see also United States v. Dean*, 487 F.3d 840, 853 (11th Cir. 2007) (noting that the pattern jury instruction for that circuit includes the "knowingly and dishonestly" language in the definition of corruptly); *United States v. Saldana*, 427 F.3d 298, 303 (5th Cir. 2005); *Kelly*, 147 F.3d at 176-77.

As it stands, there is no uniformly applied requirement that the Government prove knowledge of illegality to convict a defendant of a tax felony under § 7212(a) even though knowledge of illegality is required for every other federal tax crime. The College is concerned that lack of uniformity among the lower courts in defining a key element of a federal felony opens the door to abuse of prosecutorial discretion. The College, therefore, implores this Court to recognize that § 7212(a)—like every other tax crime—requires knowledge of illegality.

2. *§ 7212(a) Should Not be an Exception to the Rule that Tax Felonies Require an Affirmative Act.*

Requiring an affirmative act for a violation of § 7212(a) is necessary to provide fair notice of what conduct constitutes a felony. As described above, the *Spies* Court distinguished the tax misdemeanors from felony evasion by finding that use of the word "attempt" in the felony required an affirmative act. *Spies*, 317 U.S. at 498-99. In addition, the Court found that "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the same derelictions it had just defined . . . as a misdemeanor." *Id.* at 497. This Court should follow the lead of the *Spies* Court in finding that use of the word "endeavor" in § 7212(a) requires an affirmative act, and that conduct specifically described as a misdemeanor elsewhere in the Code is not a corrupt endeavor sufficient to support a conviction under § 7212(a).

In the decision below, the Second Circuit found that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration" of the code under § 7212(a). *United States v. Marinello*, 839 F.2d 209, 225 (2d Cir. 2016). To support that conclusion, it explained that "surely a defendant could be charged under section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide a proper accounting of business income and expenses." Ironically, the court "recognize[d] that the scope of omissions on which an omnibus clause violation

could be based is not limitless," and then cited *United States v. Wood*, 384 F. App'x 698, 708 (10th Cir. 2010), for the suggestion that "it is a 'questionable proposition' that a defendant's mere failure to file tax returns could constitute a violation of the omnibus clause, particularly because the 'willful failure to file tax returns is addressed in a different section of the Internal Revenue Code, 26 U.S.C. § 7203.'" *Marinello*, 839 F.3d at 225 n.15. Congress, however, designated willful failure to "keep any records, or supply any information" to the IRS—the exact conduct the *Marinello* court found could "surely" be charged as a felony under § 7212(a)—a misdemeanor under § 7203.

In *Wood*, the court found that the defendant "made a plausible argument" that there was plain error in the instructions to the jury because: (1) the willful failure to file tax returns is addressed in a different section of the Code, (2) the government "identified no language in the Code suggesting that the same conduct constituting a violation of § 7203 (a misdemeanor) may also constitute a violation of § 7212 (a felony)," and (3) the government provided no authority supporting the theory that "the failure to file under § 7203 can constitute[ ] a 'corrupt[ ] endeavor'" under § 7212. *Id.* (first alteration added). The court in *Wood*, however, did not decide whether an omission covered by § 7203 could constitute an endeavor for purposes of § 7212 because it found, instead, that the defendant was unable to show that the potential error was prejudicial when there was strong evidence that the defendant engaged in the other means of obstruction charged by the government. *Id.* at 709-10.

Marinello's conviction highlights the dangers of allowing prosecutors to charge omissions as felonies under § 7212(a). Marinello was charged and convicted of the misdemeanors he committed. But the jury was instructed that it could also convict him of felony obstruction in violation of § 7212(a) "on the grounds, variously, that Marinello did not keep adequate records; that, having kept them, he destroyed them; or that, having kept and preserved them from destruction, he failed to give them to his accountant." *United States v. Marinello*, 855 F.3d 455, 456 (2d Cir. 2017) (Jacobs, J., dissenting). Congress defined failure to keep records as a misdemeanor, but the court below found that failure alone was sufficient for the jury to convict Marinello of a felony.

Felony obstruction under § 7212(a) should require more than one of the failures to act that Congress categorized as misdemeanors. If Congress's use of the word "attempt" in describing tax evasion is sufficient to require an affirmative act, surely the word "endeavor" in § 7212(a) fulfills the same purpose.

D. *Any Broader Reading of § 7212(a) Threatens to Undermine the Tax Enforcement System.*

Uniformity, predictability, and comprehensibility are important anchors at the foundation of the tax enforcement system. As the Department of Justice has recognized:

> The Government helps to preserve the integrity of this Nation's self-assessment tax system through vigorous and uniform criminal

> enforcement of the internal revenue laws. Criminal prosecutions punish tax law violators and deter other persons who would violate those laws. To achieve maximum deterrence, the Government must pursue broad, balanced, and uniform criminal tax enforcement. Uniformity in tax cases is necessary because tax enforcement potentially affects more individuals than any other area of criminal enforcement. Broad and balanced enforcement is essential to effectively deter persons of varying economic and vocational status, violators in different geographic areas, and different types of tax law violations.

U.S. Dep't of Justice, *Criminal Tax Manual* § 2.00 (2012), https://www.justice.gov/sites/default/files/tax/legacy/2015/03/27/CTM%20Chapter%202.pdf (incorporating U.S. Attorneys' Manual 6-4.010.) Effective tax enforcement relies on deterrence, and deterrence relies on uniform application of comprehensible distinctions between lawful conduct and criminal behavior. A broad reading of the residual clause in § 7212(a) defeats congressional intent by impeding, rather than promoting, deterrence.

The Government's sweeping interpretation of § 7212(a) criminalizes such a vast array of conduct that it makes enforcement purely a matter of prosecutorial whim. By reading out of the statute any requirement that one be aware of an IRS proceeding, or that the taxpayer (or his lawyer) have undertaken a single affirmative act, the decision below allows prosecutors to look back with hindsight to identify any past omission that may have had the

effect of securing an advantage for the taxpayer, and use that omission to extend the criminal net. When prosecutors have such unrestrained authority to make law through their enforcement choices, the inevitable result is at least the perception—if not the reality—of selective, arbitrary prosecution. This arbitrariness lessens the perceived legitimacy of the tax laws, and leads to increased violations rather than compliance. *See* Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. Rev. Online 152 (2015) (arguing that overcriminalization increases the commission of criminal acts because it facilitates the most prevalent and powerful rationalizations used by would-be offenders).

The purpose of criminal tax enforcement is to preserve the integrity of the comprehensive tax system Congress enacted. A broad reading of § 7212(a) thwarts that purpose by impermissibly shifting the power to define criminal liability to prosecutors. That shift not only violates the Due Process clause, but undermines the integrity of the tax enforcement system.

CONCLUSION

For the foregoing reasons, the College respectfully encourages the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

ARMANDO GOMEZ
DAVID W. FOSTER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
202-371-7000

JENNY L. JOHNSON
Counsel of Record
GUINEVERE M. MOORE
JOHNSON MOORE LLC
150 North Wacker Drive
Suite 1250
Chicago, IL 60606
312-549-9990
Jenny.johnson@
jmtaxlitigation.com

Attorneys for Amicus Curiae

Dated: September 8, 2017

RECORD AND BRIEFS

No. 16-1144

Supreme Court, U.S.
FILED
APR 21 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CARLO J. MARINELLO, II,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W.
Washington, D.C. 20036
(202) 872-8600

JOHN VECCHIONE*
ERICA L. MARSHALL
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
john.vecchione@causeofaction.org

Counsel for Amici Curiae

Counsel of Record

April 21, 2017

272711

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

BRIEF OF *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER 1

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 4

ARGUMENT 5

I. This Court Should Grant Certiorari because Under the Law in the Majority of Circuits, the "Corruptly" *Mens Rea* Requirement Fails to Limit the Reach of 26 U.S.C. § 7212(a)'s "Omnibus Clause" 5

A. This Court Has Routinely Cabined Omnibus Clauses 6

B. The Definition of "Corruptly" Applied to 26 U.S.C. § 7212(a) Does Not Restrict the Application of the Statute in Any Meaningful Manner 8

Table of Contents

Page

1. Whether the Defendant Had the "Intent to Obtain an Unlawful Benefit" Depends on Whether the Benefit Was Unlawful, Not on Whether the Defendant *Knew* the Benefit Was Unlawful. 9

2. Even Legal Acts or Omissions Can be Criminal.....11

3. The "Unlawful Benefit" Does Not Need to be a Tax Benefit.....12

C. The Prevailing § 7212(a) "Omnibus Clause" Interpretation Swallows the Remainder of the Criminal Provisions of Title 26 and Grants Prosecutors Unfettered Discretion 13

II. The Court Should Grant Certiorari to Vindicate its Ruling in *Aguilar*.....16

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Abuelhawa v. United States,
556 U.S. 816 (2009) 18

City of Chicago v. Morales,
527 U.S. 41 (1999) 13

DeCoster v. United States,
No. 16-877 (2017) 2

Dowling v. United States,
473 U.S. 207 (1985) 7

Elonis v. United States,
135 S. Ct. 2001 (2015) 9

Gonzales v. Carhart,
550 U.S. 124 (2007) 9

Gould v. Gould,
245 U.S. 151 (1917) 7

McBoyle v. United States,
283 U.S. 25 (1931) 6-7

McCutcheon v. Fed. Election Comm'n,
134 S. Ct. 1434 (2014) 1

McDonnell v. United States,
136 S. Ct. 2355 (2016) 6

Cited Authorities

Page

Overton v. United States,
No. 15-1504 (2017) 2

Rewis v. United States,
401 U.S. 808 (1971) 7

United States v. Aguilar,
515 U.S. 593 (1995) 6, 16, 17, 21

United States v. Armstrong,
974 F. Supp. 528 (E.D. Va. 1997) 14

United States v. Balint,
258 U.S. 250 (1922) 9

United States v. Biller,
No. 1:06-cr-14, 2006 U.S. Dist.
LEXIS 100493 (N.D. W. Va. July 17, 2006) 11

United States v. Black,
No. CR 12-0002 (N.D. Cal.) 2

United States v. Bostian,
59 F.3d 474 (4th Cir. 1995) 11

United States v. Bowman,
173 F.3d 595 (6th Cir. 1999) 12

United States v. Brennick,
908 F. Supp. 1004 (D. Mass. 1995) 8, 9

Cited Authorities

Page

United States v. Floyd,
740 F.3d 22, 32 (1st Cir. 2014) 3, 13

United States v. Giambalvo,
810 F.3d 1086 (8th Cir. 2016) 12, 13

United States v. Hanson,
2 F.3d 942 (9th Cir. 1993) 9

United States v. Kahre,
No. 2:05-cr-121, 2009 U.S. Dist.
LEXIS 39473 (D. Nev. Apr. 20, 2009) 11

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998) 3, 5, 17

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998) 3, 8, 9

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) 4, 8, 11, 18

United States v. Massey,
419 F.3d 1008, 1010 (9th Cir. 2005) 3

United States v. Miner,
774 F.3d 336 (6th Cir. 2014) 3

United States v. Mitchell,
985 F.2d 1275 (4th Cir. 1993) 7

Cited Authorities

Page

Overton v. United States,
No. 15-1504 (2017) 2

Rewis v. United States,
401 U.S. 808 (1971) 7

United States v. Aguilar,
515 U.S. 593 (1995) 6, 16, 17, 21

United States v. Armstrong,
974 F. Supp. 528 (E.D. Va. 1997) 14

United States v. Balint,
258 U.S. 250 (1922) 9

United States v. Biller,
No. 1:06-cr-14, 2006 U.S. Dist.
LEXIS 100493 (N.D. W. Va. July 17, 2006) 11

United States v. Black,
No. CR 12-0002 (N.D. Cal.) 2

United States v. Bostian,
59 F.3d 474 (4th Cir. 1995) 11

United States v. Bowman,
173 F.3d 595 (6th Cir. 1999) 12

United States v. Brennick,
908 F. Supp. 1004 (D. Mass. 1995) 8, 9

Cited Authorities

Page

United States v. Floyd,
740 F.3d 22, 32 (1st Cir. 2014) 3, 13

United States v. Giambalvo,
810 F.3d 1086 (8th Cir. 2016).....12, 13

United States v. Hanson,
2 F.3d 942 (9th Cir. 1993).....9

United States v. Kahre,
No. 2:05-cr-121, 2009 U.S. Dist.
LEXIS 39473 (D. Nev. Apr. 20, 2009) 11

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998).....3, 5, 17

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998).....3, 8, 9

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) 4, 8, 11, 18

United States v. Massey,
419 F.3d 1008, 1010 (9th Cir. 2005).....3

United States v. Miner,
774 F.3d 336 (6th Cir. 2014).....3

United States v. Mitchell,
985 F.2d 1275 (4th Cir. 1993).....7

Page

United States v. Popkin,
943 F.2d 1535 (11th Cir. 1991) 3, 11, 16

United States v. Reeves,
752 F.2d 995 (5th Cir. 1985) 19, 20, 21

United States v. Saldana,
427 F.3d 298 (5th Cir. 2005) 3, 9, 12

United States v. Santos,
553 U.S. 507 (2008) 7

United States v. Sorenson,
801 F.3d 1217 (10th Cir. 2015) ..... *passim*

United States v. Sun-Diamond Growers,
526 U.S. 398 (1999) 6

United States v. Williamson,
746 F.3d 987 (10th Cir. 2004) 10

United States v. Wilson,
118 F.3d 228 (4th Cir. 1997) 9, 11

United States v. Wiltberger,
18 U.S. 76 (1820) 7

United States v. Wood,
384 Fed. App'x. 698 (10th Cir. 2010) 16

Page

Yates v. United States,
135 S. Ct. 1074 (2015) 2

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 2 16

18 U.S.C. § 1503 ..... 18, 19

18 U.S.C. § 1956 16

26 U.S.C. § 6103 14

26 U.S.C. § 6531(6) 17

26 U.S.C. § 7201 ..... 4, 15

26 U.S.C. § 7202 15

26 U.S.C. § 7212 17

26 U.S.C. § 7212(a) ..... *passim*

26 U.S.C. § 7213 14

26 U.S.C. § 7701 8

Supreme Court Rule 37.2 1

Cited Authorities

Page

Eugene Volokh, *Is asking IRS agents to leak President Trump's tax return a crime (and constitutionally unprotected)?*, Wash. Post., Mar. 6, 2017 15

Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 673 (Winter 2006) 10

Kathryn Keneally, Column: White Collar Crime, 21 Champion 25 (Aug. 1997) 12

Kristen Hickman, *Of Lenity, Chevron, and KPMG*, 26 Va. Tax. Rev. 905 (2007).....7

Larry M. Eig, Congressional Research Service, Statutory Interpretation: General Principles and Recent Trends (Dec. 19, 2011).....18

BRIEF OF *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") and National Association of Criminal Defense Lawyers respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICI CURIAE*

Amicus curiae CoA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA Institute has a particular interest in challenging government overreach in the criminal justice system,

---

1. In accordance with Supreme Court Rule 37.2(a), CoA Institute notified the counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute and National Association of Criminal Defense Lawyers financially contributed to preparing this brief. The consents from the parties are being submitted herewith.

2. CoA Institute, *About*, http://www.causeofaction.org/about (last visited Apr. 21, 2017).

protecting the rule of law, and working to combat the criminalization of conduct that can be addressed through existing civil law—*i.e.*, the process of "overcriminalization." In order to fulfill this mission, CoA Institute has represented criminal defendants in federal court, *e.g.*, *United States v. Black*, No. CR 12-0002 (N.D. Cal.), appeared as *amicus curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), and appeared as *amicus curiae* in other criminal matters before this court. *See, e.g.*, *DeCoster v. United States*, No. 16-877 (2017); *Overton v. United States*, No. 15-1504 (2017).

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL files numerous amici briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amici assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has an interest in ensuring the fair and just development of basic criminal law principles, including limits on prosecutorial discretion and upholding *mens rea* requirements. NACDL believes that this case presents an appropriate vehicle for the Court to clarify the prosecutorial limits and *mens rea* requirements of the "omnibus clause" of 26 U.S.C. § 7212(a).

SUMMARY OF ARGUMENT

The Sixth Circuit has cabined the "omnibus clause" of 26 U.S.C. § 7212(a) to limit its application to cases where

the defendant knew of an active Internal Revenue Service ("IRS") investigation. *United States v. Miner*, 774 F.3d 336 (6th Cir. 2014); *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998). Three other circuits, however, now joined by the Second Circuit, have expressly repudiated the Sixth Circuit's warning that failure to limit the omnibus clause would "open[] the statute to legitimate charges of overbreadth and vagueness," *Kassouff*, 144 F.3d at 958, and instead held that knowledge of a specific IRS investigation is not required for conviction under section 7212(a)'s omnibus clause. *See United States v. Floyd*, 740 F.3d 22, 32 (1st Cir. 2014); *United States v. Sorenson*, 801 F.3d 1217 (10th Cir. 2015); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005).

These circuits, taking false comfort in the bounds placed on the statute by the term "corruptly," have issued broad-sweeping interpretations of the same clause that transform it from a narrow obstruction statute into a catchall felony provision applicable in nearly any prosecution under Title 26.

While other felony provisions in Title 26 impose a "willfull" *mens rea* requirement, the omnibus clause punishes anyone who "corruptly" endeavors to obstruct or impede the administration of Title 26. 26 U.S.C. § 7212(a). To act "corruptly" is to act "with intent to gain an unlawful advantage or benefit for oneself or for another." *See, e.g.*, *Sorenson*, 801 F.3d at 1217; *United States v. Saldana*, 427 F.3d 298, 305 (5th Cir. 2005); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991).

As this otherwise statutorily-undefined term has been applied across the land, any act or omission that obstructs the administration of the tax code is a felony so long as the defendant committed that act or omission to gain an "unlawful benefit"—whether or not the defendant *knew* that benefit was unlawful, whether or not the act or omission itself is a legal act, and whether or not the unlawful benefit sought by the defendant was even related to the tax code. As interpreted by these circuit courts, the requirement that the defendant act "corruptly" is a *mens rea* requirement in name only, and one that fails to limit the reach of the omnibus clause in any meaningful manner.

This Court should grant certiorari to mend the circuit split, clarify the scope of conduct governed by 7212(a), and explain the applicable *mens rea* requirement that now threatens unconstitutionally "to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted." *See* Pet. App. 46a, *United States v. Marinello*, No. 15-2224, Denial of Rehearing En Banc (Jacobs, J., dissenting).

STATEMENT OF THE CASE

In *United States v. Marinello*, the United States obtained an indictment against Mr. Carlo J. Marinello, II, under 26 U.S.C. § 7212(a)'s "omnibus clause" of the criminal portion of the tax code, which makes it a felony to "in any other way corruptly . . . obstruct [] or impede [] or endeavor [] to obstruct or impede, the due administration of [Title 26]." Pet. App. 6a–7a. Although the tax code expressly sets forth numerous felonies, and requires the government to prove that the defendant "willfully" violated those statutes, *see, e.g.*, 26 U.S.C. § 7201, *et seq.*,

the government argued, and the Second Circuit agreed, that Mr. Marinello could be guilty of the felony of corruptly obstructing or impeding the administration of the tax code by performing acts as common as "failing to maintain corporate books and records for . . . his small business," "failing to provide [his] accountant with complete . . . information related to [his] personal income," and "discarding business records" because he performed these acts and omissions with the intent to obtain an unlawful benefit—not paying taxes. *See* Pet. App. 6a–7a, 32a–35a.

The Second Circuit declined to extend the holding in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), which would have required the government to prove that the defendant took action to impede or obstruct a pending IRS action in order to obtain a conviction under the omnibus clause. Pet. App. 23a–25a. Rejecting the Sixth Circuit's concerns of vagueness and overbreadth, the Second Circuit stated that the term "corruptly" sufficiently restricts the reach of the omnibus clause. Pet. App. 27a.

ARGUMENT

1. This Court Should Grant Certiorari because Under the Law in the Majority of Circuits, the "Corruptly" *Mens Rea* Requirement Fails to Limit the Reach of 26 U.S.C. § 7212(a)'s "Omnibus Clause."

This Court has interpreted omnibus clauses narrowly so as to limit their reach, ensure that the public is on fair notice of what the law requires, and to ensure limits to prosecutorial discretion in enforcing criminal laws. The Court should grant certiorari to reign in the scope of

conduct currently criminalizable under the omnibus clause as applied in four circuits.

A. This Court Has Routinely Cabined Omnibus Clauses.

This Court has interpreted omnibus provisions of this kind within the context of the statute in which the omnibus provision appears in order to limit its reach. *See, e.g., United States v. Aguilar*, 515 U.S. 593, 599–600 (1995) (interpreting a similarly-worded obstruction of justice "omnibus clause" to require a nexus in time, causation, or logic with a judicial proceeding, such that the defendant must have acted with an intent to influence known judicial or grand jury proceedings).

Further, this Court narrowly construes the language in criminal statutes to confine prosecutorial discretion. *McDonnell v. United States*, 136 S. Ct. 2355, 2368, 2372–73 (2016) (stating that "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly'" and adopting a "bounded interpretation of 'official act'") (citations omitted); *see also United States v. Sun-Diamond Growers*, 526 U.S. 398, 408, 412 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions, and holding that "a statute . . . that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter").

This principle parallels the common law principle that courts must construe criminal statutes narrowly to afford fair notice of their provisions, *Augilar*, 515 U.S. at 600 (citing *McBoyle v. United States*, 283 U.S. 25, 27

(1931)), and that Congress, rather than other branches of the government, defines crimes. *Id.* at 600 (citing *Dowling v. United States*, 473 U.S. 207 (1985)).

If the text of the statute is unclear, the rule of lenity directs courts to interpret ambiguous criminal laws in favor of criminal defendants. *United States v. Wiltberger*, 18 U.S. 76 (1820). It requires that all uncertainties in a law with criminal applications be resolved in favor of the defendant. *United States v. Santos*, 553 U.S. 507, 514 (2008); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").[3] Moreover, in interpreting tax laws, this Court requires strict construction that tells against the government in any case of doubt. *Gould v. Gould*, 245 U.S. 151, 153 (1917).

In flagrant disregard for this Court's teachings, the majority of the circuit courts to review section 7212(a)'s omnibus clause have expressly interpreted it *broadly*. *See Sorenson*, 801 F.3d at 1225–26 ("we have favorably cited other cases broadly interpreting § 7212(a)'s omnibus clause"); *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) ("the inclusion of the omnibus "in any other way" and "the due administration of this title" language encourage a broad rather than narrow construction"); *Popkin*, 943 F.2d at 1538.

---

3. *See* Kristen Hickman, *Of Lenity, Chevron, and KPMG*, 26 Va. Tax. Rev. 905 (2007) (In discussing the circumstances in which all of the *Chevron* and *Skidmore* deference doctrines will apply in civil law, "the Court has called for employing traditional canons of statutory construction in evaluating whether a statute's meaning is clear. In other words, as a canon of construction, the rule of lenity may operate as a tie-breaker between competing statutory interpretations to establish a statute's supposed plain meaning.").

Dismissing overbreadth and vagueness concerns, such courts, including the Second Circuit here, take comfort in the chimerical prosecutorial limits they derive from the statutorily-undefined requirement that the defendant have acted "corruptly" to obstruct the administration of the tax code. Pet. App. 27a, *United States v. Marinello*, 839 F.3d 209, 222 (2d Cir. 2016) ("other courts . . . have decided that section 7212(a)'s '*mens rea* requirement' sufficiently 'restricts the omnibus clause's reach only to conduct that is committed "corruptly"'"); *Kelly*, 147 F.3d at 176 (rejecting vagueness and overbreadth challenges to 7212(a) and agreeing with five other circuits in concluding that the use of the term "corruptly" in section 7212(a) does not render this provision unconstitutionally vague or overbroad (citing *United States v. Brennick*, 908 F. Supp. 1004, 1010–13 (D. Mass. 1995))).

This Court should intervene, however, as the cases demonstrate that the requirement that the defendant have acted "corruptly" does not actually require knowledge of anything, and as applied by these circuit courts does nothing to place a defendant on notice of what actions are criminal, or to curb the reach of the statute, or check prosecutorial discretion by limiting the conduct that is potentially criminalized.

B. The Definition of "Corruptly" Applied to 26 U.S.C. § 7212(a) Does Not Restrict the Application of the Statute in Any Meaningful Manner.

The term "corruptly" is not defined in the tax code. *See* 26 U.S.C. § 7701 (listing definitions). Under the definition adopted by most circuit courts, to act "corruptly" is to

"act with intent to gain an unlawful advantage or benefit either for oneself or for another." *See Sorenson*, 801 F.3d at 1225; *Saldana*, 427 F.3d at 305; *Kelly*, 147 F.3d at 177; *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997); *United States v. Hanson*, 2 F.3d 942, 946 (9th Cir. 1993); *Popkin*, 943 F.2d at 1540.

1. Whether the Defendant Had the "Intent to Obtain an Unlawful Benefit" Depends on Whether the Benefit Was Unlawful, Not on Whether the Defendant *Knew* the Benefit Was Unlawful.

The requirement that the defendant act "corruptly," as currently interpreted by some circuit courts, does not expressly require proof that the defendant *knew* the benefit he sought was unlawful. The "corruptly" *mens rea* requirement equates to a *mens rea* requirement in name only. It fails to comport with this Court's routinely-espoused scienter requirement. *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (stating that it is a basic principle that "'wrongdoing must be conscious to the criminal'" and "a defendant must be 'blameworthy in mind' before he can be found guilty") (internal citations omitted); *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (stating that *mens rea* requirements "alleviate vagueness concerns" and "narrow the scope of the prohibition and limit prosecutorial discretion"); *United States v. Balint*, 258 U.S. 250, 251–52 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it.").

In *United States v. Sorenson*, 801 F.3d 1217 (10th Cir. 2015), the defendant used a trust scheme to reduce his taxable assets by $1.5 million. He was indicted on one count—obstructing the administration of the tax code. At trial, Sorenson insisted that he did not know that the use of the trusts or the reduction in tax liability was unlawful and asked the District Court to instruct the jury that, to find him guilty, it must find that he *knew* the use of the trust scheme was illegal. *Id.* at 1229–30. The Court refused to give the instruction and the Tenth Circuit affirmed, stating that "as in *Williamson*, we need not decide" whether the definition of corruptly requires knowledge of illegality." *Id.* at 1230 (citing *United States v. Williamson*, 746 F.3d 987, 992 (10th Cir. 2004) (leaving "to another day whether a conviction under § 7212(a) requires that the defendant knew that the advantage or benefit he sought was unlawful")).

As Judge Jacobs warned, the line between "aggressive tax avoidance" and "corrupt obstruction" can be hard to discern and is often not clear. Pet. App. 45a. Under the "corruptly" standard, as it is currently applied, criminality hinges on the prosecutor's ability to show a benefit was unlawful, rather than the mental state of the defendant at the time of the act or omission. *See* Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 673 (Winter 2006) ("While it would be impossible—and counterproductive—to attempt to stamp out all prosecutorial discretion, there is clearly a point beyond which the code's empowerment of prosecutors is harmful . . . [and] many former prosecutors like me—believe that we have passed that tipping point by a substantial margin.").

2. Even Legal Acts or Omissions Can be Criminal.

The circuit majority also holds that under the "corruptly" standard, even lawful conduct is criminal if done with the intent to obtain an unlawful benefit. *See Wilson*, 118 F.3d at 234 (stating that "even legal actions [can] violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others"); *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995) (posting an enlarged copy of a *lis pendens* violated 7212(a) where intended to impede the government's efforts to sell seized property); *Popkin*, 943 F.2d at 1540 (creating a company violated 7212(a) where "at least one intent in creating the corporation was to secure an unlawful benefit on his client"); *United States v. Kahre*, No. 2:05-cr-121, 2009 U.S. Dist. LEXIS 39473, at *9–11 (D. Nev. Apr. 20, 2009) (while buying property in a family member's name is not, in and of itself, illegal, defendants could properly be convicted under § 7212(a) if they were motivated by a desire "to secure an unlawful benefit for oneself or for another"); *United States v. Biller*, No. 1:06-cr-14, 2006 U.S. Dist. LEXIS 100493, at *13 (N.D. W. Va. July 17, 2006) ("The acts themselves need not be illegal. Even legal actions violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others.")

Under the Second Circuit's panel decision here, even doing nothing at all can be criminal if done with an intent to obtain an unlawful benefit. *Marinello*, 839 F.3d at 225 (holding that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code").

3. The "Unlawful Benefit" Does Not Need to be a Tax Benefit.

Under the law in some circuits, the "unlawful benefit" sought by the defendant does not even need to be a benefit under the tax code. In other words, the omnibus clause could be used to prosecute a person who "obstructs the administration of Title 26" with the intent to seek *any* unlawful benefit. *United States v. Giambalvo*, 810 F.3d 1086, 1097 (8th Cir. 2016) (rejecting the argument that "the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage"); *Saldana*, 427 F.3d at 305 (holding that 7212(a) does not require that the defendant obtain benefits or advantages "under the tax laws" and upholding the conviction where Saldana filed reports with the IRS documenting false transactions with targeted individuals in astronomical amounts in the hope it would lead the IRS to audit those individuals); *United States v. Bowman*, 173 F.3d 595, 596–97 (6th Cir. 1999) ("affirming a defendant's conviction for violation of § 7212(a) when the defendant had filed false 1099 and 1096 forms for the sole purpose of intimidating and harassing his creditors" and finding that the defendant's conduct "fell within the ambit of § 7212(a)'s proscribed conduct even though he sought no financial advantage or benefit for himself under the tax laws").

In this regard, under current authority from the lower courts, the omnibus clause of section 7212(a) has reached far beyond conduct directed at IRS employees. *See* Kathryn Keneally, Column: White Collar Crime, 21 Champion 25, 26, 28 (Aug. 1997) (stating that "somewhat troubling[ly], however, the government and some courts have . . . expanded[ed] the reach of Section 7212(a) to

circumstances in which the harassing conduct was not directed at IRS employees, but at other government employees or private citizens," notwithstanding the DOJ Tax Division's policy directive (current as of 1997), limiting prosecutions to "conduct directed at IRS personnel in the performance of their duties, or in the context of an ongoing investigation or proceeding").

Similarly, prosecution under section 7212(a) does not require proof of a tax deficiency. *See Giambalvo*, 810 F.3d at 1097; *Floyd*, 740 F.3d at 32 ("A conviction for violation of section 7212(a) does not require proof of . . . a tax deficiency.").

C. The Prevailing § 7212(a) "Omnibus Clause" Interpretation Swallows the Remainder of the Criminal Provisions of Title 26 and Grants Prosecutors Unfettered Discretion.

Under the unbounded interpretations provided by the circuit majorities, doing something or doing nothing is a felony if it impedes the "administration of [the tax code]" so long as the defendant sought to obtain an unlawful benefit from the act or omission. The potential for felony prosecution under section 7212(a)'s omnibus clause is endless as it is currently applied by the majority of the circuits. A penal law is void for vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited or fails to establish guidelines to prevent arbitrary enforcement of the law. *City of Chicago v. Morales*, 527 U.S. 41, 64–65 (1999).

Under the regime, a prosecutor could charge a person under section 7212(a) for not providing his accountant travel receipts that implicated him in a crime, or for throwing away accounting documents that were relevant in a different lawsuit. For example, imagine that a CEO discards a travel receipt that would normally need to be documented by an accountant because that receipt places him at the scene of a crime. The CEO intended to obtain an unlawful benefit (destruction of evidence). But this is not the type of conduct that Congress anticipated could be prosecuted under 7212(a). *See United States v. Armstrong*, 974 F. Supp. 528, 531 (E.D. Va. 1997) (alleging the defendant violated the omnibus clause when he withheld his travel expense reimbursements from his tax return preparer).

Title 26 contains numerous provisions pertaining to the administration of the tax code that apply to corporations, nonprofit entities, charities, labor unions, and even government employees. For example, Congress protects the confidentiality of taxpayer information under Title 26 and an IRS employee has certain duties to maintain taxpayer confidentiality. *See* 26 U.S.C. § 6103; *id.* § 7213 (establishing criminal penalties for any IRS official that improperly discloses confidential taxpayer information). If a person emails an IRS official to procure the identity of a taxpayer, could this constitute the corrupt obstruction of the administration of Title 26 since the individual was seeking an unlawful benefit—the identity of a taxpayer? Similarly, there are questions left open under current interpretations as to whether an IRS official who actually disclosed taxpayer information could be prosecuted under section 7212(a)'s omnibus clause rather than section 7213 (which imposes a willfulness

requirement). *See* Eugene Volokh, *Is asking IRS agents to leak President Trump's tax return a crime (and constitutionally unprotected)*?, Wash. Post., Mar. 6, 2017, http://wapo.st/2oPUmmg (discussing journalist Nicholas Kristof's tweet encouraging IRS employees to mail him the President's tax returns).

Mr. Marinello was indicted for corruptly impeding the due administration of the tax code by failing to maintain "corporate books and records for . . . his small business," "failing to provide [his] accountant with complete . . . information related to [his] personal income," and "discarding business records" based on the government's accusations that Mr. Marinello did these acts (or omissions) with an intent to obtain an unlawful benefit (not paying taxes). *See* Pet. App. 6a–7a, 32a–35a.

The unlawful benefit Marinello sought to obtain—not paying taxes—is, of course, itself a felony under the tax code, but one that requires the government to prove a "willful" violation. *See, e.g.*, 26 U.S.C. § 7202 ("any person required under this title to . . . pay . . . any tax imposed by this title who willfully fails to . . . pay . . . such tax shall . . . be guilty of a felony"); *id.* § 7201 (stating that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony").

This heightened *mens rea* standard requires the government to prove a voluntary, intentional violation of a known legal duty. *Sorenson*, 801 F.3d at 1226. However, in this case, the government was able to obtain a felony conviction without proving that Mr. Marinello had knowledge that he was breaking the law. And similarly,

in *Sorenson*, the government was able to obtain a felony conviction arising out of conduct that amounted to tax evasion in the amount of $1.5 million under the omnibus clause of the obstruction statute, rather than the specific tax evasion code provision, without having to prove that Sorenson acted willfully. *Sorenson*, 801 F.3d at 1230; *see also United States v. Wood*, 384 Fed. App'x. 698, 704 (10th Cir. 2010) (holding that Mr. Wood acted with the intent to secure an unlawful benefit—non-payment of income taxes—without discussing that this, too, is a crime under Title 26 for which the government must prove a willful violation); *Popkin*, 943 F.2d at 1541–43 (Roney, J., dissenting) (stating that Popkin was guilty of a crime for setting up a corporation to hide income, but that crime was money laundering, 18 U.S.C. § 1956, or aiding and abetting tax fraud, 18 U.S.C. § 2, not obstruction under section 7212(a)).

This Court should grant Mr. Marinello's petition to address the circuit split and limit the reach of section 7212(a)'s omnibus clause in order to provide the public with clear notice of prohibited conduct and set meaningful limits on prosecutorial discretion for this obstruction statute.

II. The Court Should Grant Certiorari to Vindicate its Ruling in *Aguilar*.

In *United States v. Aguilar*, this Court imposed a "nexus" requirement to the obstruction of justice statute and supported a strict reading of obstruction statutes generally. 515 U.S. at 600. This Court should grant certiorari here to correct the lower courts' departure from this instruction.

When read in the context of the rest of the statute, the text of 7212(a)'s omnibus clause is properly cabined to apply only to known IRS actions or investigations, such that any criminal conduct must involve acts related to specific IRS agents or employees. *See Kassouff*, 144 F.3d at 956-958 (applying *United States v. Aguilar*, 515 U.S. 593 (1995)).[4]

This Court's reasoning in *Aguilar* is plainly germane here. Section 7212(a)'s omnibus clause at issue here states that:

> Whoever . . . corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title . . . [shall, upon conviction, be fined and imprisoned].

26 U.S.C. § 7212.

This matches almost precisely with the obstruction of justice omnibus clause interpreted in *Aguilar*, which states that:

> Whoever corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due

4. Indeed, even the statute of limitations for section 7212(a) recognizes that the proscribed conduct in 7212(a) relates "to intimidation of officers and employees of the United States." 26 U.S.C. § 6531(6).

> administration of justice . . . [shall be guilty of a felony].

18 U.S.C. § 1503. In *Aguilar*, this Court refused to parse words to untether the omnibus clause from the rest of the obstruction statute—which discussed jurors and existing judicial proceedings. Indeed, to do so would ignore the rule that, statutes are not read as a collection of isolated phrases. *Abuelhawa v. United States*, 556 U.S. 816, 819–820 (2009); *see also* Larry M. Eig, Congressional Research Service, Statutory Interpretation: General Principles and Recent Trends at 3 (Dec. 19, 2011), *available at* http://bit.ly/2oRyYP0 ("Under text-based analysis the cardinal rule of construction is that the whole statute should be drawn upon as necessary, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.").

Rejecting this approach, and even distinguishing *Aguilar* as "inapposite," Pet. App. 23a, *Marinello*, 839 F.3d at 209, the majority of the circuit courts have created a regime under section 7212(a)'s omnibus clause that is untethered from the remainder of the obstruction statute, which pertains to obstructing specific IRS officials and employees. 26 U.S.C. § 7212(a) (prohibiting endeavors to impede "any o*fficer or employee* of the United States acting in an official capacity under this title").[5] The Court

---

5. Section 7212(a) states in full: "Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede *any officer or employee* of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the

should not allow the circuits to weaken its teachings in *Aguilar* without correction.

Historically, the two statutes are bound. The *Reeves* Court, the first circuit court to interpret the provisions of 7212(a) in 1985 and establish the definition of "corruptly" now adopted by the majority of the circuit courts—actually formed this definition based on the definition developed in case law interpreting 18 U.S.C. § 1503—even while discussing the differences in the text of sections 7212(a) and 1503. *See United States v. Reeves*, 752 F.2d 995, 998-1001 (5th Cir. 1985).

The Fifth Circuit rejected a definition for "corruptly" requiring only "improper motive or bad or evil purpose" as insufficient to guard against vagueness concerns. *Id.* at 999–1000; *see also Brennick*, 908 F. Supp. at 1011-13 (summarizing the evolution of the definition of "corruptly" within the context of 7212(a) cases). Rather, the Fifth Circuit, relying on statutory interpretations of 18 U.S.C. § 1503, held that the government must prove that the defendant acted with "an intent to give some advantage inconsistent with the official duty and rights of others." *Reeves*, 752 F.2d at 999. The Court stated:

---

due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm *to the officer or employee of the United States or to a member of his family*" (emphasis added).

> We have found no cases interpreting the word "corruptly" in section 7212, but cases interpreting analogous sections of the United States Code have interpreted "corruptly" not to mean "with improper motive or bad or evil purpose." In the case most closely on point, *United States v. Ogle*, 613 F.2d 233 (10th Cir. 1979), the defendant contended that the jury instructions in that case "should have included reference to an evil motive, something bad, wicked or having an evil purpose." . . . The court disagreed, pointing out that "corruptly" is not used in this fashion in 18 U.S.C. § 1503, the statute at issue in that case. . . . Rather, it is directed to the effort to bring about a particular result such as affecting the verdict of a jury or the testimony of a witness.

Reeves, 752 F.2d at 998. Applying this reasoning from section 1503 cases, the *Reeves* court went on to caution that without the limit placed on section 1503 to apply it only to pending judicial actions, section 1503 could suffer from vagueness concerns, and that the same caution should be applied when approaching 7212(a) prosecutions:

> In addition, we have upheld section 1503 as not unconstitutional on vagueness grounds largely because the statute covers only actions related to pending judicial proceedings, thus providing adequate notice to potential violations . . . We have noted in the past that except for those narrow circumstances "we would tend to agree with the . . . claim that the statute 1503 is unconstitutionally vague."

Id. at 999–1000 (citations omitted).

When this Court interpreted and clarified the section 1503 omnibus clause in *Aguilar*, courts should have followed suit under the similarly worded section 7212(a) omnibus clause. This Court should intervene to address this variance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W.
Washington, D.C. 20036
(202) 872-8600

JOHN VECCHIONE*
ERICA L. MARSHALL
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
john.vecchione@causeofaction.org

Counsel for Amici Curiae

Counsel of Record

April 21, 2017

ECORD
AND
BRIEF

FILED
-1 2017

No. 16-1144

IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER

JOSEPH M. LATONA
403 Main Street
716 Brisbane Building
Buffalo, NY 14203

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
DAVID BITKOWER*
MICHAEL E. STEWART
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

*Admitted in New York

QUESTION PRESENTED

Section 7212(a) of the Internal Revenue Code includes the following provision:

> Whoever corruptly or by force ... endeavors to intimidate or impede any officer ... of the United States acting in an official capacity under this title, *or in any other way corruptly or by force ... endeavors to obstruct or impede[] the due administration of this title,* shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both ....

26 U.S.C. § 7212(a) (emphasis added).

The question presented is whether § 7212(a)'s residual clause, italicized above, requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

PARTIES TO THE PROCEEDING 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

A. Statutory Background 5

B. Statement of Facts 10

1. Factual Background And Proceedings In The District Court 10

2. Proceedings In The Second Circuit 12

SUMMARY OF ARGUMENT 15

ARGUMENT 23

I. The Text And Legislative History Of Section 7212(a) Demonstrate That It Is Limited To Obstruction Of A Known IRS Proceeding. 23

A. Section 7212(a)'s "Due Administration" Language Has Long Been Understood To Require Obstruction Of A Proceeding Of Which The Defendant Was Aware. 23

B. The Text Of §7212(a) As A Whole Confirms That Congress Intended To Criminalize Obstruction Of A Known IRS Proceeding. 28

C. This Court Has Refused To Read Comparable Obstruction Provisions Broadly. 34

D. The Legislative History of § 7212 Further Confirms That The Government's Interpretation Is Incorrect. 37

II. The Government's Interpretation Cannot Be Reconciled With The Tax Code's Other Criminal Provisions. 40

A. The Code's Core Misdemeanors Become Felony Obstruction Under The Government's Interpretation. 42

B. The Government's Interpretation Transforms § 7212 Into An All-Purpose Felony That It Can Use Where It Cannot Prove The Elements Of Other Crimes. 49

C. The Government's Interpretation Allows It To Tack A § 7212(a) Charge On To Almost Any Other Core Tax Crime. 51

III. Section 7212(a)'s Corrupt *Mens Rea* Requirement Does Not Justify The Government's Interpretation. 52

IV. To The Extent The Court Finds § 7212(a) Ambiguous, The Rule Of Lenity Warrants Reversal. 56

CONCLUSION 59

TABLE OF AUTHORITIES

CASES

Achilli v. United States, 353 U.S. 373 (1957) 41, 48, 50

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) 18, 19, 34, 35, 45, 56, 57

Bilski v. Kappos, 561 U.S. 593 (2010) 47

Cheek v. United States, 498 U.S. 192 (1991) 42, 43

Cleveland v. United States, 531 U.S. 12 (2000) 57

Dowling v. United States, 473 U.S. 207 (1985) 28

Freytag v. Commissioner, 501 U.S. 868 (1991) 47

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) 23, 26

Liparota v. United States, 471 U.S. 419 (1985) 57

Marx v. General Revenue Corp., 568 U.S. 371 (2013) 19

McDonnell v. United States, 136 S. Ct. 2355 (2016) 31, 32, 33, 48, 54

Pettibone v. United States, 148 U.S. 197 (1893) 16, 25, 26

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 29

Sansone v. United States, 380 U.S. 343 (1965) 48, 49, 50

Smith v. City of Jackson, 544 U.S. 228 (2005) 26

Spies v. United States, 317 U.S. 492 (1943) 48, 49

United States v. Aguilar, 515 U.S. 593 (1995) 16, 17, 26, 27, 41, 55, 57

United States v. Anderson, 384 F. Supp. 2d 32 (D.D.C. 2005) 52

United States v. Bishop, 412 U.S. 346 (1973) 43

United States v. Floyd, 740 F.3d 22 (1st Cir. 2014) 43

United States v. Giambalvo, 810 F.3d 1086 (8th Cir. 2016) 43-44

United States v. Henderson, 386 F. Supp. 1048 (S.D.N.Y. 1974) 9

United States v. Johnson, 462 F.2d 423 (3d Cir. 1972) 29

United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998) 12, 13

United States v. Lovern, 293 F.3d 695 (4th Cir. 2002) 29

United States v. Martin, 747 F.2d 1404 (11th Cir. 1984) 29

United States v. Morris, 3 F. App'x 223 (6th Cir. 2001) 51

United States v. Rybicki, 403 F.2d 599 (6th Cir. 1968) 29

United States v. Sorensen, 801 F.3d 1217 (10th Cir. 2015) 43

Yates v. United States, 135 S. Ct. 1074 (2015) 32, 36, 37, 47, 50, 52, 57

STATUTES

18 U.S.C. § 111(a)(1) 38
18 U.S.C. § 1503(a) 13, 24
26 U.S.C. § 7201 50
26 U.S.C. §§ 7201-7345 7
26 U.S.C. § 7203 ..... 20, 42, 44
26 U.S.C. § 7205 20
26 U.S.C. § 7205(a) 46
26 U.S.C. § 7205(b) 46
26 U.S.C. § 7206 49
26 U.S.C. § 7206(1) 20
26 U.S.C. § 7207 46
26 U.S.C. § 7212(a) 15, 17, 18, 24, 29
26 U.S.C. § 7212(b) 30, 47
Act of Mar. 2, 1831, ch. 99, § 2, 4 Stat. 487 24
Internal Revenue Code of 1939, ch. 34, § 3601(c), 53 Stat. 435, 436 6
Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 855 ..... 5, 7
Internal Revenue Service Act of 1864, ch. 173, § 38, 13 Stat. 223, 238 6

LEGISLATIVE MATERIALS

H.R. Rep. No. 80-304 (1947) 25, 26
H.R. Rep. No. 83-1337 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 4017 ..... 7, 8, 9, 38, 39

H.R. Rep. No. 83-2543 (1954) (Conf. Rep.) 9

S. Rep. No. 83-1622 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 4621 ..... 7, 8, 9, 19, 38, 39

OTHER AUTHORITIES

Brief for the United States on Writ of Certiorari, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 738080 56

Robert S. Fink and Caroline Rule, *The Growing Epidemic of Section 7212(a) Prosecutions—Is Congress the Only Cure?*, 88 J. Tax'n 356 (1998) 9

John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L.J. 255 (2009) 9

John F. Witte, *The Politics and Development of the Federal Income Tax* (1985) 37

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the caption.

OPINIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a-39a) is reported at 839 F.3d 209. The order denying rehearing *en banc* and the dissent from denial of *en banc* review (Pet. App. 40a–50a) is reported at 855 F.3d 455. The trial court's order (Pet. App. 51a-57a) denying Petitioner's motion for acquittal is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on October 14, 2016. A timely petition for rehearing *en banc* was denied on February 15, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7212(a) of Title 26 provides:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both.

INTRODUCTION

The Internal Revenue Code was overhauled in 1954 to create a coherent set of criminal offenses governing tax-related misconduct. This case is about whether the government is correct that Congress nonetheless chose to supplant and expand the dozens of defined offenses in the code by creating an all-purpose tax crime: the felony tax obstruction statute, 26 U.S.C. § 7212(a).

Section 7212(a) punishes those who "corruptly or by force ... impede any officer ... acting in an official capacity under [the Code], or in any other way corruptly or by force ... obstruct[] ... the due administration of [the tax code]." The relevant language of the provision replicates an existing obstruction statute limited to acts aimed at impeding ongoing "proceedings." But according to the government, the due administration of the tax code is "continuous, ubiquitous, and universally known to exist," and thus § 7212(a) criminalizes any "corrupt" act or omission that has the effect of hindering the IRS in any way. BIO at 9.

That reading of § 7212(a) is doubly untenable. In the first place, it upends the tax code's taxonomy of crime, most notably by transforming the code's core misdemeanors into felonies. For example, at the same time it enacted § 7212(a), Congress decided that the willful failure to maintain certain kinds of documents or file a tax return should be a misdemeanor. Yet as this case shows, the government contends that failing to maintain those documents or file a tax return can also be charged as felony obstruction, exposing the defendant to triple the prison sentence authorized by Congress. Similarly, no one disputes that tax evasion or tax

perjury are crimes, but those statutes require proof of specified elements. Under the government's interpretation, however, it can avoid its burden to prove those elements by relying on tax obstruction charges instead.

Equally egregious is the fact that the government's interpretation chills all sorts of *legitimate* personal and business behavior and poses the very real threat of prosecutorial abuse this Court has recognized in cases like *United States v. Aguilar*, *Arthur Andersen LLP v. United States*, *McDonnell v. United States*, and others. Individuals and businesses make decisions every day that may in some way make it harder for the IRS to assess or collect taxes, such as organizing a business through a subsidiary or making payments in cash. Indeed, on the government's view an individual need not *do* anything at all to be guilty of obstruction. As this case shows, an obstruction charge can rest solely on not keeping records or failing to give complete information to an accountant. With an essentially limitless range of obstructive acts and omissions to choose among, an aggressive prosecutor will have little trouble alleging that a defendant acted "corruptly," *e.g.*, in order to hinder the IRS's assessment of the defendant's tax obligations. As the dissenters below concluded, "[i]f this is the law, nobody is safe." Pet. App. 42a.

The reality is that Congress did not intend tax obstruction to be the code's *uber*-crime. Section 7212(a)'s due administration provision, like the statute it was modeled on, is concerned with the specific and important wrong of intentionally obstructing an IRS *proceeding*, such as by providing false information in

response to an audit. As this Court's holdings teach, Congress does not surreptitiously criminalize broad swaths of otherwise lawful conduct in the residual provisions of more limited offenses, particularly where doing so would undercut core provisions of the same act.

Petitioner Marinello was not charged with or convicted of felony tax evasion, and he does not challenge his misdemeanor convictions for having failed to file his tax returns. But he does challenge his felony obstruction conviction under § 7212(a), which was premised on his failure to maintain records and other acts and omissions not taken in the context of any IRS proceeding or investigation. This Court should give § 7212(a) its proper construction and reverse the conviction and judgment below.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the current tax obstruction statute, 26 U.S.C. § 7212(a), as part of its comprehensive overhaul of the Internal Revenue Code in 1954. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 855. The predecessors of § 7212(a) covered only the use of force against IRS officers. The earliest predecessor – Section 38 of the Internal Revenue Service Act of 1864 – provided:

> That if any person shall forcibly obstruct or hinder any assessor or assistant assessor, or any collector or deputy collector, revenue agent or inspector, in the execution of this act, or of any power and authority hereby vested in him, or shall forcibly rescue, or cause to be rescued, any

> property, articles, or objects, after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending shall, upon conviction thereof, for every such offence, forfeit and pay the sum of five hundred dollars, or double the value of property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court....

Internal Revenue Service Act of 1864, ch. 173, § 38, 13 Stat. 223, 238.

Congress next addressed tax obstruction in the 1939 Internal Revenue Code. Those 1939 amendments split the prior obstruction provision into two separate subsections—one dealing with force against IRS officers and the other dealing with forcible rescues of seized property. Internal Revenue Code of 1939, ch. 34, § 3601(c), 53 Stat. 435, 436. According to that revised provision:

> If any person shall ... (1) ... [f]orcibly obstruct or hinder any collector, deputy collector, internal revenue agent, or inspector, in the execution of any power and authority vested in him by law, or (2) ... [f]orcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of $500, ... or be imprisoned for a term not exceeding two years, at the discretion of the court.

Id.

Congress adopted the present-day obstruction statute including the residual clause in 1954 as part of comprehensive revisions to the tax code. That amendment punished those who "corruptly or by force or threats of force ... endeavor[ ] to intimidate or impede any officer or employee of the United States acting in an official capacity under this title or in any other way corruptly or by force or threats of force ... obstruct[ ] or impede[ ], or endeavor[ ] to obstruct or impede, the due administration of this title ...." Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 855.

The House and Senate Reports explained that the amended language including the residual clause was intended to ensure that IRS officers were protected from more than just forcible obstruction. The Reports characterized the expanded § 7212(a) as "similar" to 18 U.S.C. § 111, which criminalized assaults against federal employees engaged in the performance of their duties, but with "amplified" protections for IRS employees to "cover[ ] all cases where the officer is intimidated or injured; *that is, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws.*" S. Rep. No. 83-1622, at 147 (1954), *as reprinted* in 4621, 4782 (emphasis added); H.R. Rep. No. 83-1337 at 108 (1954), *as reprinted* in 1954 U.S.C.C.A.N. 4017, 4135-36.

Other portions of the House and Senate Reports likewise described § 7212(a) as being concerned with protecting officers from threats and corrupt solicitation: "[The new language] provides for the punishment of threats or threatening acts *against agents of the*

Internal Revenue Service, or any other officer or employee of the United States, or members of the families of such persons, *on account of the performance by such agents or officers or employees of their official duties*," and "will also punish the corrupt solicitation *of an internal revenue employee*." S. Rep. No. 83-1622, at 604, 1954 U.S.C.C.A.N. at 5254 (emphasis added); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.AN. at 4574-75; *see also* S. Rep. No. 83-1622, at 587, 1954 U.S.C.C.A.N. at 5236-37 (characterizing the "offense described in section 7212 (a)" as "relating to intimidation *of officers and employees of the United States*" (emphasis added)); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.A.N. at 4574-75 (same).

The new § 7212(a) was just one part of a complex set of revisions in which Congress eliminated and consolidated a number of tax offenses that had previously been scattered throughout the tax code and that set forth different penalties for similar conduct. As part of the legislative process, Congress placed most of the criminal provisions in what is now Chapter 75 of the Code, and then debated and revised the penalties applicable to the felonies and misdemeanors set forth in that chapter. *See* 26 U.S.C. §§ 7201-7345; H.R. Rep No. 83-1337 at 108, 1954 U.S.C.C.A.N. at 4135 ("In this chapter all criminal offenses are brought together....").

For example, prior to the 1954 revisions the willful failure to file a tax return was a misdemeanor subject to at most one year in prison. The House bill proposed to elevate that offense to a felony subject to a maximum of five years in prison. The Senate version rejected the House changes, and the Conference acceded to the

Senate version, keeping the offense as a misdemeanor, codified at 26 U.S.C. § 7203. H.R. Rep. No. 83-1337, at A424, 1954 U.S.C.C.A.N. at 4572; S. Rep. No. 83-1622, at 147, 601-02, 1954 U.S.C.C.A.N. at 4782, 5251; H.R. Rep. No. 83-2543, at 82 (1954) (Conf. Rep.). The Conference Committee also accepted other Senate amendments including reductions to the sentences provided in the House bill for making false or fraudulent statements under § 7206 and the maximum fines for other offenses. *Id.* at 81–82.

There appear to have been only two reported cases involving a prosecution under § 7212(a)'s residual clause in the first two decades after the provision was enacted. In one of the earliest cases, *United States v. Henderson*, 386 F. Supp. 1048, 1055 (S.D.N.Y. 1974), the government took the position that § 7212(a) "applies only to acts or threats of physical violence" against the IRS and its employees. *Id.* The government began to expand its use of § 7212(a)'s residual clause in the 1980's and 1990's to include prosecutions of "garden-variety tax evasion or false return cases." Robert S. Fink and Caroline Rule, *The Growing Epidemic of Section 7212(a) Prosecutions—Is Congress the Only Cure?*, 88 J. Tax'n 356, 358 (1998); *see also* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L.J. 255, 300–01 & n.210 (2009) (noting that § 7212(a) prosecutions "blossomed" in the 1990s).

B. Statement of Facts

1. Factual Background And Proceedings In The District Court.

Petitioner Carlo J. Marinello, II, owned and operated a freight service business in western New York that couriered items between the United States and Canada. Pet. App. 2a. Marinello did not maintain business records or file corporate or personal income tax returns from approximately 1992 through 2010. Pet. App. 2a. In 2004, the IRS investigated Marinello for tax evasion on the basis of an anonymous tip. Pet. App. 4a. The IRS subsequently closed that investigation because it could not determine whether any unreported income was significant. Pet. App. 4a. Marinello had no knowledge of that investigation. Pet. App. 4a.

In 2009, the IRS reopened its investigation. On June 1, 2009, IRS agents interviewed Marinello at his home. Pet. App. 5a. During that interview, he admitted that he had failed to file tax returns, used business income to pay for personal expenses, and destroyed bank statements and business records. Pet. App. 5a. In 2012, following the investigation, a superseding indictment filed in the United States District Court for the Western District of New York charged Marinello with nine counts of tax-related offenses for conduct that he engaged in prior to learning of any IRS investigation. Pet. App. 6a.

Specifically, eight of those counts charged Marinello with misdemeanors under 26 U.S.C. § 7203 for willfully failing to file timely personal income and corporate tax returns for the years 2005 through 2008. Pet. App. 6a. The remaining count charged Marinello with violating 26

U.S.C. § 7212(a)'s residual clause. Marinello was not charged with felony tax evasion, 26 U.S.C. § 7201, nor was he charged with the misdemeanor of failing to maintain tax documents, 26 U.S.C. § 7203.

In support of the felony § 7212 charge, the superseding indictment alleged that Marinello had, from approximately January 2005 until approximately April 15, 2009: (1) failed to maintain corporate books and records; (2) failed to provide his accountant with complete and accurate information related to his personal income and the income of his business; (3) destroyed, shredded, and discarded business records; (4) cashed business checks received for services rendered; (5) hid business income in personal accounts; (6) transferred assets to a nominee; (7) paid employees with cash; and (8) used business receipts and funds from business accounts to pay personal expenses.[1] Pet. App. 6a-7a. There was no allegation that Marinello lied to investigators or otherwise obstructed the IRS after investigators contacted him in June 2009.

Marinello ultimately went to trial in 2014. Over his objection, the district court instructed the jury that proof beyond a reasonable doubt of any one of the eight obstructive acts or omissions alleged in the indictment would be sufficient to find Marinello guilty under § 7212(a), and that the jury need not agree on which of

---

[1] In the original indictment, the government also charged Marinello with § 7212(a) obstruction based on his failure to file a tax return. The government dropped that charge only after Marinello moved to strike it as duplicative of the misdemeanor failure-to-file count. Pet. App. 7a n.1.

the eight acts or omissions had been proved. Pet. App. 9a.

The jury convicted Marinello on all counts. The district court sentenced Marinello to thirty-six months' imprisonment for violating § 7212(a), twelve months' imprisonment for each of the remaining eight misdemeanor counts—all sentences to be served concurrently—and one year of supervised release. Pet. App. 15a; *see also* Amended Judgment, ECF No. 130, *United States v. Marinello*, No. 1:12-cr-00053-WMS-HBS-1 (W.D.N.Y. July 16, 2015). The court also ordered Marinello to pay $351,763.08 to the IRS in restitution. Pet. App. 15a.

Marinello moved for a judgment of acquittal or new trial under Federal Rules of Criminal Procedure 29 and 33 on the ground, *inter alia*, that the phrase "the due administration of this title" in section 7212(a) refers exclusively to pending IRS investigations, and that a defendant may be convicted under the statute only if he knowingly interferes with such an investigation. Pet. App. 10a. The trial court denied that motion and held that "[k]nowledge of a pending [IRS] investigation is not an essential element of the crime." Pet. App. 51a-57a.

2. Proceedings In The Second Circuit.

Marinello timely appealed. As relevant here, he challenged his conviction under § 7212(a) on the ground that guilt under the residual clause requires knowledge of a pending IRS action or investigation—a fact the government had not proved. Pet. App. 15a. He urged the Second Circuit to adopt the Sixth Circuit's interpretation of § 7212(a), which held, in *United States*

v. Kassouf, 144 F.3d 952 (6th Cir. 1998), that the statute's reference to "due administration of the Title requires some pending IRS action" – such as a subpoena or audit – "of which the defendant was aware." *Id.* at 957 & n.2.

The Second Circuit rejected the Sixth Circuit's interpretation. It held that the statute covers any corrupt act or omission that obstructs or impedes any activity under the tax code. Pet. App. 25a-26a. In so holding, the court acknowledged that in *United States v. Aguilar* this Court had previously held that a nearly identical provision prohibiting corrupt efforts to obstruct or impede "the due administration of justice," 18 U.S.C. § 1503(a), *did* require a defendant to know that his actions would affect judicial or grand jury proceedings. Pet. App. 20a-21a (discussing *United States v. Aguilar*, 515 U.S. 593, 598-600 (1995)). The Second Circuit distinguished *Aguilar*, however, on the ground that § 7212(a) prohibits interfering with the "due administration of this title [*i.e.*, the Internal Revenue Code]" rather than the "due administration of justice." Pet. App. 24a. According to the Second Circuit, that "difference indicates that the statutes carry different meanings" and that § 7212(a) "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities." Pet. App. 24a-25a (emphasis in original) (quoting *United States v. Willner*, No. 07 Cr. 183(GEL), 2007 WL 2963711, at *5 (S.D.N.Y. Oct. 11, 2007)).

The Second Circuit acknowledged the Sixth Circuit's concern that such a reading would expose a defendant to felony charges for "conduct which was legal (such as

failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." Pet. App. 22a (quoting *Kassouf*, 144 F.3d at 957). But it held that concerns about the sweep of the statute were unwarranted because the statute required the defendant to have acted "corruptly," which it defined as seeking to obtain an "unlawful advantage or benefit either for one's self or another." Pet. App. 27a, 18a.

Marinello sought rehearing *en banc*, which was denied over a sharp dissent authored by Judge Jacobs and joined by Judge Cabranes. The dissent warned that by rejecting the Sixth Circuit's interpretation, the panel had "cleared a garden path for prosecutorial abuse." Pet. App. 41a. It argued that there was no material difference between § 7212(a) and the residual clause at issue in *Aguilar*, and that the panel failed to recognize that this Court has repeatedly cast a "cold eye on broad residual criminal statutes (particularly omnibus clauses like the one here)" in cases like *Aguilar*. Pet App. 43a-45a.

Judge Jacobs further rejected the panel's contention that the statute's "corrupt" *mens rea* requirement provided adequate protection, given that corruption could easily be charged by an aggressive prosecutor, and "the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Pet. App. 45a. The dissent concluded that the panel's decision threatened allowing a regime where a prosecutor could say "Show me the man, and I'll find you the crime." Pet. App. 49a-50a.

After Marinello filed a timely petition for certiorari, this Court granted review on June 27, 2017. On June 28,

2017, Marinello moved in the district court for bail pending this Court's decision on the merits. The government did not oppose the motion, and the district court granted bail on July 12, 2017.

SUMMARY OF ARGUMENT

Section 7212(a) defines two categories of criminal conduct:

> Whoever [1] corruptly or by force or threats of force ... endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, [2] or in any other way corruptly or by force or threats of force ... obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title shall ... be ... imprisoned for not more than 3 years.

26 U.S.C. § 7212(a).

The question here is whether the second prohibition – "or in any other way corruptly or by force ... obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title" – includes acts and omissions not taken against an IRS agent or otherwise in the context of an IRS proceeding such as an audit or investigation.

The government contends that "tax administration is continuous, ubiquitous, and universally known to exist," BIO 9, and therefore any act or omission that may ultimately make the IRS's job more difficult at some later point could be obstructive within the meaning of § 7212(a). That interpretation is as sweeping as it is

incorrect. All sorts of legitimate behavior have the effect of making it more difficult for the IRS to assess an individual's or business's tax liability. An aggressive prosecutor would have little difficulty alleging that such behavior was corrupt, *i.e.*, taken for the purpose of hindering the IRS's ability to assess tax liability or for some other unlawful benefit. And even where a defendant has acted culpably, the government's interpretation upends the careful system of tax offenses and corresponding punishments that Congress created.

The text, structure, and legislative history of § 7212(a) and the criminal provisions of the tax code as a whole confirm that Congress did not bestow such unconstrained powers on prosecutors. Instead, § 7212(a)'s due administration clause is limited to conduct intended to impede an IRS proceeding.

I.A. Beginning with the text of § 7212(a), the "due administration" language Congress employed in the residual clause has long been understood to be limited to instances in which a defendant intentionally interferes with a known proceeding. Section 7212(a)'s language is nearly identical to 18 U.S.C. § 1503's prohibition on "obstruct[ing] or imped[ing] the due administration of justice," which had been on the books in materially similar form since the early 19th century.

As early as 1893, this Court held that this provision required proof not just that the defendant intended to obstruct law enforcement generally, but that he intended to obstruct a judicial proceeding of which he was aware. *Pettibone v. United States*, 148 U.S. 197, 206 (1893). This Court reaffirmed that interpretation in *United States v. Aguilar*, 515 U.S. 593 (1995), holding

that Congress would have spoken much more clearly had it intended to devise something as broad as an all-purpose criminal prohibition on false statements outside the context of judicial proceedings. 515 U.S. at 599.

Congress is presumed to know the judicial interpretation of existing law when it enacts legislation. Moreover, the same concerns that animated this Court's narrower reading of the due administration language in § 1503 apply with equal or even greater force here. The government contends that "due administration" of the tax code is ubiquitous and unceasing – apparently more so even than the "due administration of justice." But that is precisely why this Court ought not assume that Congress intended to impose a felony on anyone who engaged in the vast array of conduct – or inaction – that could be said to impede the IRS. That kind of "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability." *Aguilar*, 515 U.S. at 602.

B. Petitioner's construction of the due administration language is reinforced by the text of § 7212 as a whole. The first part of that provision prohibits intentional interference with IRS officers, namely "corrupt" or "forcible" acts that "intimidate or impede any officer or employee of the United States acting in an official capacity." 28 U.S.C. § 7212(a). This provision requires proof that the defendant knew that he was impeding an IRS agent in the course of his duties, such as through an assault or bribe.

Section 7212(a)'s parallel prohibition against "*or in any other way* corruptly or by force ... obstruct[ing] or imped[ing] ... the due administration of this title"

encompasses conduct that obstructs the IRS in a comparably direct way. 28 U.S.C. § 7212(a) (emphasis added). If the defendant does not know that he is impeding a particular agent, he must at least know he is impeding a particular IRS proceeding, such as an audit or enforcement action. Indeed, if the residual clause reached every act or omission that could be said to hinder the IRS, there would have been no need to include the first part of the statute dealing with obstruction of officers. Marinello's construction is faithful to the Court's approach to the prohibitions at issue in cases like *McDonnell v. United States* where this Court looked to context to avoid giving unintended breadth to legislation and rendering the other terms of the statute superfluous.

C. Unlike the government's interpretation, petitioner's interpretation also comports with other decisions from this Court interpreting analogous obstruction statutes like *Arthur Andersen LLP v. United States* and *Yates v. United States*. For example, in *Arthur Andersen*, this Court considered a provision that barred corruptly persuading another person to destroy a document to be used in an official proceeding. The Court vacated a conviction on the ground that the jury was not asked to find that the defendant sought the destruction of documents in order to prevent them from being used in a "particular official proceeding." 544 U.S. 696, 708 (2005). Absent that finding, the statute would sweep too broadly and potentially criminalize legitimate document destruction. As the Court put it, "[a] 'knowingly ... corrup[t] persaude[r]' cannot be someone who persuades others to shred documents under a

document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." *Id.* The same considerations that animated those decisions apply here.

D. Finally, the legislative history of § 7212(a) gives no hint of the breadth that the government claims today. To the contrary, the legislative history makes clear that the residual clause was simply intended to ensure that the statute "cover[ed] all cases where the officer is intimidated or injured; *that is*, where corruptly, by force or threat of force, directly or by communication, *an attempt is made to impede the administration of the internal-revenue laws*." S. Rep. No. 83-1622, at 147, 1954 U.S.C.C.A.N. at 4782 (emphasis added). Other references to § 7212(a) in the legislative history exclusively describe § 7212(a) as a provision concerned with direct harm to or corruption of the IRS and its officers.

II. Another basic interpretative requirement is that a statutory scheme should be read as a whole and harmonized to avoid superfluousness. *Marx v. General Revenue Corp.*, 568 U.S. 371, 386-87 (2013). Petitioner's construction of § 7212(a) meets that requirement because it limits § 7212(a)'s application to the distinct wrong of obstructing an IRS officer or known proceeding. In contrast, the government's interpretation causes § 7212(a) to swallow entire swaths of the criminal tax code, transforming misdemeanors into felonies, eliminating elements of other crimes, and in general serving as an enhancement that could be tacked on to any tax crime. This Court has repeatedly rejected this kind of statutory mission creep –

particularly in the context of tax crimes which are defined in a single collection of laws – and it should do so again here.

A. To begin, the government's interpretation of § 7212(a) allows it to obtain a felony conviction for conduct that Congress expressly defined to be a misdemeanor—or indeed not to be a crime at all. The tax code already contains misdemeanors encompassing conduct like failing to timely file a tax return, failing to maintain required records, and providing false withholding information to an employer. 26 U.S.C. §§ 7203 & 7205. Persons guilty of these misdemeanors are subject to a prison sentence of up to 1 year. Yet under the government's interpretation, all of this conduct – or inaction – could be charged as *felony* obstruction with its statutory maximum of a 3-year sentence. This Court has repeatedly refused to construe the tax code to create substantial overlap between misdemeanor and felony provisions, and the same result is warranted here, particularly because Congress expressly *considered and rejected* elevating some of these misdemeanors to felonies as part of the same 1954 overhaul of the tax code.

B. The government's capacious interpretation of § 7212(a) also frees it from proving the elements specified in other felonies. For example, Congress made it a felony to knowingly make a false statement to the IRS, but only where another element is met, for example where the defendant has made the statement under penalty of perjury. 26 U.S.C. § 7206(1). Absent additional elements, the tax code punishes a false statement only as a misdemeanor. 26 U.S.C. § 7207. But

the requirement that the false statement be made under penalty of perjury to constitute a felony is an empty one under the government's interpretation of obstruction because even unsworn false statements are capable of making it harder for the IRS to assess tax liability.

C. Even where the government does prove all the elements of some other crime, its interpretation of obstruction allows it to tack on that offense in almost every case. There is essentially no scenario in which a defendant who could be charged with tax evasion, tax fraud, or any of the other core felonies in the tax code, could not also be charged with obstruction, increasing his potential sentence and imposing extra pressure to take a plea deal.

III. The government and the court below placed great stress on the fact that § 7212(a) requires proof of "corrupt" obstruction, meaning proof that the defendant acted for some unlawful purpose. That *mens rea* does not meaningfully limit the scope of the statute and a prosecutor's discretion to charge the crime.

For one thing, the requirement to prove corruption does not save the statute from swallowing up the rest of the code's misdemeanors and felonies for the reasons given in Part II. Moreover, corruption is easy to allege in the context of a tax crime. The government's position is that it can look back at a taxpayer's activities and assess whether conduct taken potentially years ago has hindered the IRS in some way. Should the government conclude, say, that their investigation is hindered by the fact that the defendant employed a complex structure for a business transaction or even by the defendant's maintenance of records that government decides at that

later point are inadequate, then a zealous prosecutor will have little difficulty in alleging that these acts and omissions were taken for the purpose of hindering the IRS's ability to assess the defendant's tax liability.

This Court, in cases like *Aguilar* and *Arthur Andersen*, has refused to presume that by employing a *mens rea* of corruption Congress meant to criminalize any and all acts that hinder the government, even if the government could establish that they were taken for a corrupt purpose. The sweep of that construction is just too broad to presume absent a clear statement of Congress's intent, which is wholly absent here.

IV. Finally, to the extent that the Court finds that § 7212(a) is ambiguous, it should apply the rule of lenity and reject the government's construction. That rule is motivated by the concern that a criminal statute should provide fair warning to the world of its scope. This Court should not presume that Congress meant to create a federal felony out of a broad array of conduct undertaken by individuals in their private lives where there is no connection to an IRS officer or proceeding.

ARGUMENT

I. The Text And Legislative History Of Section 7212(a) Demonstrate That It Is Limited To Obstruction Of A Known IRS Proceeding.

A. Section 7212(a)'s "Due Administration" Language Has Long Been Understood To Require Obstruction Of A Proceeding Of Which The Defendant Was Aware.

Statutory construction begins with statutory language and this Court has "often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010) (citing authority). When Congress imported the "due administration" language in § 7212(a) it was using venerable phrasing that this Court had authoritatively construed to be limited to obstruction of a *known proceeding*.

Specifically, § 7212(a)'s due administration provision, which was added to its predecessor provision in 1954, parallels almost word-for-word the obstruction of justice provision set out in 18 U.S.C § 1503(a):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, ... or corruptly or by threats or force, or by any threatening letter or

> communication, influences, obstructs, *or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be punished as provided in subsection (b).

18 U.S.C. § 1503(a) (emphasis added).

Both § 1503(a) and § 7212(a) have a two-part structure in which the first part reaches whoever "corruptly" or "by threat of force" "endeavors to" "intimidate or impede" individuals carrying out a government function, and the second part reaches whoever "corruptly" or "by threat of force" "endeavors to" "obstruct or impede" the "due administration" of that government function. 18 U.S.C. § 1503(a); 26 U.S.C. § 7212(a). Both provisions expressly prohibit the use of a "threatening letter or communication" and both reach those who merely "endeavor" to accomplish the prohibited conduct as well as those who actually accomplish it. *Id.*

Congress codified § 1503(a) in 1948 (just six years before it adopted § 7212(a)) and similarly worded predecessors had been on the books since well before the Civil War. *See, e.g.*, Act of Mar. 2, 1831, ch. 99, § 2, 4 Stat. 487 (prohibiting "corruptly, or by threats or force, endeavour[ing] to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty," and "corruptly, or by threats or force, obstruct[ing], or imped[ing], or endeavour[ing] to obstruct or impede, the due administration of justice therein").

Ever since this Court's seminal 1893 decision in *Pettibone v. United States*, it has been settled that the

due administration clause required the government to prove not just that the defendant's actions hindered law enforcement generally, or even that they hindered a judicial proceeding in particular, but that the defendant *intended* that his actions hinder a *pending* judicial proceeding. In *Pettibone*, the Court vacated an obstruction conviction against defendants who were accused of violating the terms of injunction. The Court found that although the defendants might be guilty of crimes under state law (they had violated the injunction by assaulting the employees of a competitor) they could not be convicted of obstruction because there was no evidence that they had any "notice or knowledge" of the injunction. 148 U.S. at 204. The Court held that it was "necessary for the *accused to have knowledge or notice or information of the pendency of proceedings in the United States court, or the progress of the administration of justice therein*, before he can be found guilty of obstructing, or impeding, or endeavoring to obstruct or impede the same." *Id.* at 205 (emphasis added).

The meaning of § 1503's parallel clause was thus well-established at the time of § 7212's enactment in light of *Pettibone*. Indeed, when Congress codified § 1503(a) in 1948 it explained that it was making no substantive changes to the provision as it existed at the time of *Pettibone*.[2] H.R. Rep. No. 80-304, at A107 (1947). It is

---

[2] In its Brief in Opposition, the government suggested, BIO at 8, that *Pettibone* is inapposite because at the time of *Pettibone*, the obstruction statute reached "[e]very person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or

not credible that Congress intended the "due administration" language in § 7212(a) to reach the enormous range of conduct outside the context of a known IRS proceeding, when the same, recently recodified language in § 1503(a) was specifically limited to interference with known judicial proceedings. Instead, when Congress copied "the pertinent portions" of § 1503 into § 7212(a), that "close textual correspondence" indicates that Congress intended a parallel limitation. *Jerman*, 559 U.S. at 590; *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, ... it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

This conclusion is reinforced by the Court's more recent analysis of what Congress intended when it enacted § 1503. In *United States v. Aguilar*, 515 U.S. 593 (1995), the Court reaffirmed that obstruction of the due

---

impedes, or endeavors to obstruct or impede, the due administration of justice *therein*." *Pettibone*, 148 U.S. at 197 (quoting R.S. 5399) (emphasis added). But when Congress codified that provision in 1948 at 18 U.S.C. § 1503, it omitted the "therein" phrasing merely as one of several "[m]inor changes ... in phraseology." H.R. Rep. No. 80-304, at A107 (1947). Thus, when Congress used that revised "due administration" language a few years later in enacting § 7212(a), it presumably intended a "due administration" prohibition of comparable scope to the one employed by § 1503 and its materially identical predecessors. Nor does the government's contention adequately respond to this Court's discussion of § 1503 in *Aguilar*, which concluded that Congress did not intend in § 1503 to reach conduct that lacked a nexus with a judicial proceeding. *See infra*.

administration of justice requires proof of a "nexus" with a judicial proceeding. *Id.* at 599. "[T]he act must have a relationship in time, causation, or logic with the judicial proceedings." *Id.* This Court stressed that it would not read the obstruction of justice provision to sweep in every act that could interfere with law enforcement, such as "an investigation independent of the court's or grand jury's authority." *Id.* As such, the Court rejected the government's argument that § 1503 reached a defendant's knowingly false statements to a federal investigator where it was uncertain whether the statements would be used in a judicial proceeding. *Id.* at 600 ("We do not believe that uttering false statements to an investigating agent ... who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.").

In so holding, the Court emphasized that it was appropriate to read the due administration provision narrowly because the Court had "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, *Dowling v. United States*, 473 U.S. 207 (1985), and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.' *McBoyle v. United States*, 283 U.S. 25, 27 (1931)." *Id.*

Those same considerations of "deference to the prerogatives of Congress" and "fair warning" that animated the Court's construction of § 1503 apply with equal if not greater force to what Congress intended to accomplish with § 7212(a). If there is any category of

conduct that is potentially broader than conduct interfering with the "due administration" of justice, then it is the government's conception of conduct that interferes with the "due administration" of the tax code. After all, many individuals have only infrequent contact with the justice system. But an American's entire economic life is the subject of the tax code. The government seizes upon this breadth to argue that Congress must have intended to criminalize any kind of conduct that ultimately hinders the IRS, BIO at 9, but precisely the opposite inference is warranted. If Congress intended to criminalize an enormous swath of conduct, it would have said so clearly rather than use language that had traditionally had a far narrower construction. As this Court has "stressed repeatedly," "it is appropriate, before ... choos[ing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Dowling v. United States*, 473 U.S. 207, 214 (1985) (quoting *Williams v. United States*, 458 U.S. 279, 290 (1982)).

Here, Congress has done the opposite of "clearly" sweeping in any and all conduct that could be deemed obstructive – it used statutory language that had long been construed to be limited to the particular wrong of undertaking an obstructive act in the context of a legal proceeding.

B. The Text Of §7212(a) As A Whole Confirms That Congress Intended To Criminalize Obstruction Of A Known IRS Proceeding.

The language of § 7212(a) "as a whole" further confirms that Congress intended the residual clause to be limited to obstruction of a known IRS proceeding.

Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). ("[T]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.").

Section 7212(a)'s residual clause is part of a provision that is concerned with intentional interference with IRS officers, namely "corrupt" or "forcible" acts that "intimidate or impede any officer or employee of the United States acting in an official capacity." 28 U.S.C. § 7212(a). This prohibition reaches direct misconduct against IRS officers such as threats of force or attempts to intimidate or otherwise harass. *See, e.g., United States v. Lovern*, 293 F.3d 695, 697 (4th Cir. 2002) (threatening agent with bodily harm); *United States v. Martin*, 747 F.2d 1404, 1406 (11th Cir. 1984) (planting drugs in agent's car). And the statute requires proof not just that the defendant's actions intimidated or impeded an IRS agent, but that the defendant knew he was impeding an IRS agent in the course of his duties. *E.g., United States v. Rybicki*, 403 F.2d 599, 602 (6th Cir. 1968) (statute requires "knowledge that the Internal Revenue agents were such and were engaged in performing their duty"); *United States v. Johnson*, 462 F.2d 423, 428 (3d Cir. 1972).

Against that background, § 7212(a)'s parallel prohibition against "*in any other way* corruptly or by force ... obstruct[ing] or imped[ing], ... the due administration of this title" encompasses conduct that obstructs in a comparably direct way. 28 U.S.C. § 7212(a) (emphasis added). The residual clause

requires, if not direct interference with a known IRS officer, at least direct interference with a known IRS proceeding, like an audit or investigation. An individual who intentionally gives false information in response to an audit may have violated § 7212(a) even if the individual does not know the particular IRS agent assigned to the audit. But where an individual is ordering her private affairs in an otherwise perfectly legal manner in the absence of any known proceeding – say, by the manner in which she records or does not record information about her business – her conduct is not "obstruction" of the "due administration" of the tax code.[3]

Congress's choice of verbs in § 7212(a) also supports the conclusion that the residual clause is not intended to be "ubiquitous" in scope. First, as noted above, the verbs "obstruct" and "impede" were borrowed from § 1503, which was understood to be limited to proceedings. And second, the repetition of the word "impede" in both clauses of § 7212 indicates that the second clause is not boundlessly broader than the first. In the first clause, "impede" is paired with the verb "intimidate," and directly focused on those known to be IRS employees. Under the government's interpretation, however, Congress used the same word, "impede," in the residual clause to encompass any hindrance at all, direct or

---

[3] Section 7212(b) is also illuminating on this score. That provision prohibits the "forcible rescue" of property seized by the IRS, which is another form of interference with known and pending IRS enforcement action. 26 U.S.C. § 7212(b). The residual clause is thus surrounded by prohibitions of conduct that directly interferes with the IRS, and should be likewise construed.

indirect, present or future, by act or by omission. It cannot be that Congress limited impediment of an *officer* to actions directly impeding a known officer, while allowing potentially any conduct, no matter how far removed from an interaction with the IRS – to constitute impediment under the residual clause.

Indeed, the very breadth of the government's interpretation establishes its impossibility, because the residual clause would make the rest of § 7212(a) – and likely § 7212(b) as well – entirely superfluous. The "officers" clause prohibits corruptly or forcibly impeding an IRS officer or employee "acting in an official capacity under this title." But if the residual clause of § 7212(a) is read to prohibit *all* corrupt or forcible impeding of the IRS, then there would have been no need to include the "officers" clause in the first place. But the same Congress that added the residual clause not only retained the "officers" clause, but amended it, "amplifying" it to add the corruption and threats prong (and, as discussed below, considered this amendment more worthy of mention than the addition of the residual clause). Congress also retained and amended § 7212(b), forbidding the forcible rescue of property seized by the IRS – which is another offense that would have been superfluous had the residual clause been meant to sweep in all forcible interference with the "ubiquitous" functions of the IRS.

This case is much like this Court's recent decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), in which the Court applied "the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *Id.* at 2368 (quoting *Jarecki v. G.D. Searle &*

Co., 367 U.S. 303, 307 (1961)). While the canon is not "an inescapable rule," it "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* *See also Yates v. United States*, 135 S. Ct. 1074, 1078 (2015) ("A canon related to *noscitur a sociis*, *ejusdem generis*, counsels: 'Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'") (plurality opinion) (quoting *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003)).

Here, the "company" that the residual clause keeps is a provision requiring direct interference with IRS officers. The clause should, like the "officers" provision, be read to encompass only conduct that directly interferes with an IRS proceeding. Likewise, in *McDonnell*, the criminal provision at issue defined an "official act," *i.e.*, an act necessary to trigger liability under the federal bribery statute, to be "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *McDonnell*, 136 S. Ct. at 2367 (quoting 18 U.S.C. § 201(a)(3)). The government contended that Congress had used "'intentionally broad language'" that "encompasses nearly any activity by a public official" such that even a decision to "arrange a meeting" would

qualify as an "official act." *Id.* (quoting Br. for United States 20-21).

This Court recognized that the broadest interpretation of "any decision or action on any question [or] matter" could encompass a mere decision to hold a meeting, but it declined to give the provision such a broad construction. *Id.* Key to the Court's reasoning was the fact that the "question or matter" language was part of a list containing words like "cause, suit, proceeding or controversy." *Id.* Those latter words typically involved a "formal exercise of governmental power," *id.* at 2372, and the Court concluded that the better reading of a "decision or action" on a matter must likewise "involve a formal exercise of governmental power *that is similar in nature* to a lawsuit before a court, a determination before an agency, or a hearing before a committee," and not just merely a decision to hold a meeting on a topic without more. *Id.* (emphasis added).

So too here. The residual clause is found in the company of a criminal prohibition requiring direct and knowing interference with IRS officers, and thus likewise should be read to be "similar in nature" to the prohibitions in the first clause of the statute, and require direct and knowing interference with an IRS proceeding, lest the residual clause swallow up the other provisions of the statute. *McDonnell*, 136 S. Ct. at 2369 ("If 'question' and 'matter' were as unlimited in scope as the Government argues, the terms 'cause, suit, proceeding or controversy' would serve no role in the statute—every 'cause, suit, proceeding or controversy' would also be a 'question' or 'matter.'").

C. This Court Has Refused To Read Comparable Obstruction Provisions Broadly.

This Court's careful parsing of the due administration clause in *Pettibone* and *Aguilar* are hardly the only cases in which this Court has declined to endorse the government's maximalist interpretations of criminal obstruction statutes.

A good example is *Arthur Andersen LLP v. United States*, in which this Court considered the scope of a criminal provision stating that

> [w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person ... to ... destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both.

Arthur Andersen, 544 U.S. at 703 (quoting 18 U.S.C. § 1521(b)(2)(A)-(B)).

The jury instructions in that case had allowed the jury to convict the defendant without proving that it sought the destruction of documents in order to prevent them from being used in a "particular official proceeding." *Id.* at 708. The Court explained there were many legitimate reasons that an individual or business would seek to destroy documents, *id.* at 703-04, and – in language that echoed *Aguilar* – that the jury instructions were infirm because they led the jury to believe "that it did not have to find *any* nexus between the 'persua[sion]' to destroy documents and any

particular proceeding." *Id.* at 707. The Court held that "[a] 'knowingly ... corrup[t] persaude[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." *Id.* at 708

Notably, the Court reached this conclusion even though the statute at issue expressly stated that "an official proceeding 'need not be pending or about to be instituted at the time of the offense.'" *Id.* at 707 (quoting § 1512(e)(1)). The Court explained that it is "one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen." *Id.* at 707-08 (quoting *Aguilar*, 515 U.S. at 602).

Section 7212(a), of course, does not include any disclaimer that it applies regardless whether an official proceeding is pending. *Arthur Andersen*'s reasoning therefore applies with even greater force here. There are many legitimate reasons why a taxpayer might not retain documents or might take any number of other steps that have the effect of making the IRS's job more difficult. But absent proof that the individual took those steps for a corrupt purpose with knowledge of a pending proceeding, the individual has not obstructed within the meaning of § 7212(a). Otherwise, the provision would impose liability without "the level of 'culpability ... we usually require in order to impose criminal liability.'" *Id.* at 706.

A plurality of the Court applied similar logic in *Yates v. United States*, where it considered another

obstruction statute, enacted as part of the Sarbanes-Oxley financial reform legislation, which provides

> [w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Yates, 135 S. Ct. at 1078 (plurality opinion) (quoting 18 U.S.C. § 1519).

The question in *Yates* was whether this provision applied to a defendant fisherman who had ordered crewmen to toss undersized fish back into the sea in the hope of preventing federal authorities from confirming that he had been harvesting undersized fish in violation of federal law. This Court found that a fish was not a "tangible object" within the meaning of the statute, explaining that "it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent." *Id.* at 1079.

Instead, given that the phrase "tangible object" appeared in a list of items whose defining quality was they were capable of storing information (*i.e.*, document, record), the phrase "tangible object" should also be construed to refer to objects that stored information and

not, for example, fish. *Id.* "This is especially true because reading 'tangible object' too broadly could render 'record' and 'document' superfluous." *Id.* at 1089 (Alito, J. concurring). Again, the same considerations apply here: The context of the prohibitions in § 7212 demonstrate that the residual clause is concerned with knowing interference of IRS proceedings, and the government's broader interpretation would "cut [§ [7212(a)] loose from its ... mooring[s], " *id.* at 1079, and "render" the rest of the statute's provisions "superfluous," *id.* at 1089 (Alito, J., concurring).

D. The Legislative History of § 7212 Further Confirms That The Government's Interpretation Is Incorrect.

Section 7212's legislative history further confirms that Congress did not intend a vast expansion of the scope of tax obstruction when it added the residual clause in 1954. The 1954 amendments to the tax code were some of the most comprehensive and closely considered pieces of legislation in this country's history. They followed dozens of hearings and generated several lengthy reports that set out Congress's legislative deliberations. *See generally* John F. Witte, *The Politics and Development of the Federal Income Tax* 146 (1985) ("[The bill] entirely rewrote the federal income tax code for the first time since its initial passage in 1913."). That legislative history accompanying the revised Code gives not the slightest hint that Congress intended to create the sweeping obstruction provision the government posits. On the contrary, that history shows that Congress understood and intended the residual clause to be a modest expansion of existing law, focused on

combatting corruption and other forms of direct obstruction of IRS officers.

As recounted above, prior to the adoption of § 7212 in 1954, Congress had enacted tax obstruction statutes that prohibited only "forcible" interference with IRS officers and the forcible rescue of seized property. *See supra* at 5-6. In adopting the expanded terms of Section 7212(a), Congress explained that it had looked to 18 U.S.C. § 111, a criminal provision that prohibited the "assault" of federal employees "while engaged in or on account of the performance of official duties." 18 U.S.C. § 111(a)(1). In the only passage of legislative history directly referring to the "due administration" provision, both the Senate and House Report accompanying § 7212 explained that the new tax obstruction provision was "[a] similar, but amplified, provision ... cover[ing] all cases where the officer is intimidated or injured; *that is*, where corruptly, by force or threat of force, directly or by communication, *an attempt is made to impede the administration of the internal-revenue laws*." S. Rep. No. 83-1622, at 147, 1954 U.S.C.C.A.N. at 4782 (emphasis added); *see also* H.R. Rep. No. 83-1337, at 108, 1954 U.S.C.C.A.N. at 4135-36 (using nearly identical language). In other words, the "due administration" clause was intended to expand the obstruction prohibition to reach forms of interference other than force—*e.g.*, bribery—but was still concerned with direct interference.

The rest of § 7212(a)'s legislative history does not even mention the residual clause as a separate concept. Instead, it consistently describes the new provision as focused on combatting misconduct against IRS officers.

S. Rep. No. 83-1622, at 604, 1954 U.S.C.C.A.N. at 5254 ("[Section 7212] provides for the punishment of threats or threatening acts *against agents of the Internal Revenue Service*, or any other officer or employee of the United States, or members of the families of such persons, *on account of the performance by such agents or officers or employees of their official duties*," and "will also punish the corrupt solicitation *of an internal revenue employee*." (emphasis added)); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.A.N. at 4574-75 (same). S. Rep. No. 83-1622, at 587, 1954 U.S.C.C.A.N. at 5236-37 (characterizing the "offense described in section 7212 (a)" as "relating to intimidation *of officers and employees of the United States*" (emphasis added)); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.A.N. at 4574-75 (same). Again, there is no hint that Congress intended the due administration provision of § 7212(a) to sweep broadly beyond conduct directly affecting a known proceeding of the IRS or activity of its agents.

***

In short, if Congress had intended to dramatically expand the obstruction provision in § 7212 to reach otherwise lawful conduct that could one day make the IRS's job more difficult, it would have said so. Instead, every textual clue in the statute and the accompanying legislative history indicates that Congress intended the residual clause to reach the knowing obstruction of an IRS proceeding, just as its companion clause reaches the knowing obstruction of IRS officers.

II. The Government's Interpretation Cannot Be Reconciled With The Tax Code's Other Criminal Provisions.

The government's sweeping interpretation of § 7212(a) is irreconcilable not just with the provision's text, but with the tax code's many other carefully crafted criminal provisions:

- The tax code sets out numerous misdemeanor offenses. Many of those misdemeanors, including the core prohibitions on failing to file a return and providing false statements to the IRS, could be charged as *felony* obstruction on the government's interpretation of § 7212(a), yielding a substantially higher maximum term of imprisonment and fine.

- The government's interpretation amounts to an all-purpose substitute felony when the government is unable to prove the more demanding elements that Congress required of other key tax felonies. For example, felony tax evasion requires the government to prove that the defendant undertook some affirmative evasive act. With obstruction, the government can obtain a felony conviction simply by relying on an omission.

- Even where the government can prove a tax felony, the government's interpretation would allow it to obtain a tack-on conviction for obstruction in almost every instance. Every conviction for tax evasion could be coupled with a conviction for obstruction as well.

Each provision of a statute should be read to harmonize rather than conflict with, supersede, or be redundant of other provisions. Harmonization is particularly crucial in the context of criminal prohibitions, where Congress's definition of elements and choice of punishment for a crime must be respected, and where what is prohibited must be clear "in language that the common world will understand." *Aguilar*, 515 U.S. at 600 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). This Court has in particular long policed the criminal provisions of the tax code to "give coherence to what Congress has done within the bounds imposed by a fair reading of legislation," and avoid interpretations that "would produce glaring incongruities." *Achilli v. United States*, 353 U.S. 373, 378-79 (1957), *superseded by statute as stated in Sansone v. United States*, 380 U.S. 343 (1965). And this general requirement must hold even greater sway when the several offenses under consideration were all enacted in the same Act, and Congress painstakingly explained its efforts to ensure that the resulting code produced a coherent, unified set of graduated penalties.

The government's interpretation of the residual clause produces those "glaring" – and highly unfair – incongruities, while Marinello's interpretation does not because it limits § 7212(a)'s application to the distinct conduct of knowingly impeding an IRS officer or proceeding.

A. The Code's Core Misdemeanors Become Felony Obstruction Under The Government's Interpretation.

The tax code defines a substantial amount of conduct as misdemeanors or lesser felonies that, under the government's interpretation of the obstruction clause, would double as felonies, or more serious felonies, in contravention of the punishment imposed by Congress for the more specific offense.

Section 7203. Section 7203 of the tax code is a prime example. Under that provision,

> [a]ny person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to [1] make a return, [2] keep any records, or [3] supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7203. These provisions require the government to prove that a defendant knew about the legal duty to pay a tax, keep required records, or supply information, and that he intentionally did not do so. *Cheek v. United States*, 498 U.S. 192, 202 (1991).

If the government is able to prove a misdemeanor under § 7203, it has all it needs to impose a felony punishment for obstruction under its capacious view of § 7212(a). The failure to make a return, keep required records, or supply required information to the IRS surely amounts to an impediment to what the government calls the "continuous, ubiquitous, and universally known to exist" administration of the tax code.

Nor is there any practical difference between the "willful" *mens rea* of § 7203 and the "corrupt" *mens rea* of § 7212(a) that protects defendants in this context. "Willfulness" requires the government to prove "the law imposed a duty on the defendant, that the defendant knew of that duty, and that he voluntarily and intentionally violated this duty." *Cheek*, 498 U.S. at 201; *see also United States v. Bishop*, 412 U.S. 346, 360 (1973) (defining "willfully" as denoting "a voluntary, intentional violation of a known legal duty."). "Corruption" requires the defendant to have "the intent to secure an unlawful advantage or benefit either for one's self or another." Pet. App. 18a (quoting *United States v. Parse*, 789 F.3d 83, 121 (2d Cir. 2015)); *see also United States v. Sorensen*, 801 F.3d 1217, 1225 (10th Cir. 2015); *United States v. Floyd*, 740 F.3d 22, 31 (1st Cir. 2014).

In the context of taxes, the government will almost always be able to show that a defendant who willfully disregards his duty to pay taxes or any of the other duties imposed by § 7203 has done so to obtain some unlawful advantage. That advantage may often be a financial one but it need not be, as any unlawful benefit will suffice. *United States v. Giambalvo*, 810 F.3d 1086,

1098 (8th Cir. 2016) (rejecting the argument that "the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage"). That is presumably why the government acknowledges there is no meaningful difference between the two standards. "[T]he term 'corruptly endeavors' in Section 7212(a) is 'as comprehensive and accurate as if the word "willfully" was incorporated in the statute.'" BIO 12 (quoting *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998)).

This case is a perfect example of how the government uses § 7212(a) to transform misdemeanor conduct into a felony. Marinello was in fact convicted of misdemeanors under §7203 for the willful failure to file tax returns for which he received a concurrent sentence of twelve months. Amended Judgment, ECF No. 130, *United States v. Marinello*, No. 1:12-cr-00053-WMS-HBS-1 (W.D.N.Y. July 16, 2015). But the government chose not to charge Marinello with the willful failure to maintain required records under § 7203. Had it done so, of course, Marinello would have faced the same maximum penalty of one year's imprisonment. Instead, the government took the same allegation and made it a basis for a felony conviction under § 7212(a), for which Marinello was ultimately sentenced to 36 months' imprisonment. *Id.*

The government's conduct is all the more egregious when one considers that if the government had charged Marinello with the misdemeanor crime of failing to maintain records, then it would have had to prove that the IRS actually required him to keep those records. *See* 26 U.S.C. § 7203. But by using § 7212(a) to circumvent the very crime Congress defined to address the failure

to maintain records, the government simultaneously shed part of its burden of proof and tripled Marinello's penalty.

That reading of the statute would be incoherent under any circumstances, but it is particularly so here given that Congress enacted the misdemeanor provisions of § 7203 at the same time it enacted § 7212 as a felony. *See supra* at 8. Indeed, Congress specifically considered and rejected a proposal to elevate to a felony some of the misdemeanor conduct prohibited by § 7203. *See supra* at 8-9. That debate would have been meaningless if the obstruction provision already reached such conduct.

To be sure, there could be instances in which failing to maintain documents would amount to obstruction under § 7212(a), such as when an individual does not maintain such documents after receiving a summons or an audit notification from the IRS. But that conduct – taken in response to a direct inquiry from the IRS – is more culpable than the otherwise legal destruction of documents outside the context of an IRS proceeding. *Cf. Arthur Andersen*, 544 U.S. at 707-08 (holding that requires proof that defendant knowingly and corruptly caused the destruction of documents in connection with an anticipated proceeding). Confining § 7212(a) to intentional interference with an IRS proceeding appropriately reserves the felony charge for the more serious misconduct and prevents § 7212(a) from swallowing up the misdemeanor provisions of § 7203 in their entirety.

Section 7205. Section 7205(a) requires employees to supply truthful tax withholding information to their

employers. 26 U.S.C. § 7205(a) (making it a misdemeanor to "willfully suppl[y] false or fraudulent information, or ... willfully fail[] to supply information thereunder which would require an increase in the tax to be withheld under section 3402"). A violation of this section carries a fine of up to $1000 or a prison term of up to one year. *Id.* Section 7205(b) imposes a parallel penalty for willfully making a false certification under certain portions of 26 U.S.C. § 3406(d), which requires disclosures related to interest and dividend backup withholding. 26 U.S.C. § 7205(b).

An employee who willfully provides false tax-related information to her employer almost certainly has done so to obtain an "unlawful benefit" in the form of reduced withholding or a lower tax assessment. Intentionally providing such false information would be obstruction on the government's view, even though the employee had no contact with any IRS agent or even the IRS. While such conduct is criminal, Congress's decision to make it a misdemeanor rather than a felony should be respected.

Section 7207. This provision makes it a misdemeanor to "willfully deliver[] or disclose[]" to the IRS "any list, return, account, statement, or other document, known ... to be fraudulent or to be false as to any material matter," punishable by up to one year's imprisonment. 26 U.S.C. § 7207. Congress thus made a deliberate decision to punish false statements to the IRS as a misdemeanor, and to create a separate felony provision, § 7206, for false statements made under aggravated circumstances, such as under penalty of perjury or in connection with a compromise offer. But under the Government's interpretation of § 7212(a), a willful false statement

relating to taxes would almost certainly be regarded as "corrupt," and thus expose a defendant to punishment up to three years' imprisonment.

Section 7212(b). Section 7212 itself is incoherent on the government's interpretation of obstruction. Section 7212(b) prohibits the "forcible rescue" of property seized by the IRS, and authorizes a maximum two-year sentence for violations. 26 U.S.C. § 7212(b). Yet on the government's view, any forcible rescue would amount to obstruction under § 7212(a), exposing the defendant to a three-year sentence instead.

A statutory enactment should be read as a whole to avoid reading out any provisions. *See Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment" (quoting *Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (internal quotation marks omitted)); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) (similar). *Yates* is particularly instructive on this point. As explained above, in that case, the government contended that 28 U.S.C. § 1519 reached misconduct concerning any and "all physical objects." But Congress had passed another provision, § 1512(c)(1), at the same time as § 1519, that already indisputably extended to all physical objects. The Court explained that "if §1519's reference to 'tangible object' already included all physical objects ... then Congress had no reason to enact §1512(c)(1)." *Yates*, 135 S. Ct. at 1085 (plurality opinion). The Court "resist[ed] a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act. *Id.* (*citing Marx v.*

General Revenue Corp., 568 U.S. 371, 386-87 (2013)); *see also McDonnell*, 136 S. Ct. at 2369 ("If 'question' and 'matter' were as unlimited in scope as the Government argues, the terms 'cause, suit, proceeding or controversy' would serve no role in the statute—every 'cause, suit, proceeding or controversy' would also be a 'question' or 'matter.'").

Nor is this the first time this Court has addressed an argument that a felony tax provision should be read to overlap with a misdemeanor provision. In *Achilli v. United States*, 353 U.S. 373 (1957), this Court held that under a prior version of the criminal tax code, a "general administrative provision" making tax evasion a misdemeanor could not apply to income tax evasion in light of Congress's inclusion of a specific felony income tax evasion crime within the then-operative income tax chapter. *Id.* at 379. As the Court described its holding in a later case, "the Court was unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area." *Sansone v. United States*, 380 U.S. 343, 348 (1965).

Congress was equally clear in *Spies v. United States*, 317 U.S. 492 (1943). *Spies* held that the evasion felony then codified at 26 U.S.C. § 145(b) required an affirmative act to distinguish it from the failure-to-pay misdemeanor codified at § 145(a). *Id.* at 497. Writing for the Court, Justice Jackson explained that

> [a] felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other

> offenses against the revenue laws. *But it would be unusual and we would not readily assume that Congress by the felony defined in section 145(b) meant no more than the same derelictions it had just defined in section 145(a) as a misdemeanor.*

Id. (emphasis added).

The same considerations apply here. This Court should be equally "unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area" of tax obstruction. *Sansone*, 380 U.S. at 348. Congress's decision to penalize certain specific conduct as a misdemeanor should be respected rather than discarded through a misguided interpretation of § 7212(a).

B. The Government's Interpretation Transforms § 7212 Into An All-Purpose Felony That It Can Use Where It Cannot Prove The Elements Of Other Crimes.

Under the government's construction, § 7212(a) not only enhances misdemeanors to felonies, but also provides a back-pocket secret weapon when the government is unable or unwilling to prove the elements of the felonies that Congress actually defined.

For example, as noted above, § 7206 of the tax code defines a number of crimes related to fraud and false statements in the tax context, each of which carries the same three-year exposure as § 7212(a). But these crimes apply only where the false statements were made in particular circumstances, such as under "penalt[y] of perjury." 26 U.S.C. § 7206. Yet under the government's

interpretation, § 7212(a) would capture the same basic conduct but allow the government to secure a felony conviction and a three-year sentence without having to prove that the statement was made "under the penalties of perjury," *id.* A material falsehood relating to taxes would always affect the "administration" of the tax code, and would presumably always be made in pursuit of an "unlawful benefit" in the form of a lower tax assessment.

The government's reading of § 7212(a) thus vitiates Congress's inclusion of the "under the penalties of perjury" element in § 7206(1), creating precisely the kind of "glaring incongruity" this Court has refused to read into the criminal tax provisions. *Achilli*, 353 U.S. at 379; *see also Yates*, 135 S. Ct. at 1083-84 (concluding that Congress did not intend "to make § 1519 an all-encompassing ban on the spoliation of evidence" because, in part, Congress placed the section within a chapter containing other provisions "prohibiting obstructive acts in specific contexts").

A similar incongruity is presented by the tax evasion statute, 26 U.S.C. § 7201. This section was designed by Congress to serve as the "capstone" to the carefully reticulated set of tax offenses in the 1954 code. *Sansone*, 380 U.S. at 350. To prove tax evasion, the government must establish both an affirmative act of evasion and a tax deficiency. *Id.* at 351. But the government's definition of § 7212(a) would dispense with those requirements, allowing tax obstruction to pinch hit as a junior varsity version of evasion, without any obligation to prove an affirmative act or the existence of a deficiency.

Instead, the government could, for example, obtain a felony obstruction conviction where there was proof only of inaction– *e.g.*, a failure to report income, a failure to keep records, or a failure to provide complete information to an accountant – rather than an affirmative act by the defendant. Similarly, the government could obtain a felony conviction where the defendant's actions simply made it more difficult for the IRS to determine if there had been a deficiency – even absent any proof that the defendant owed any money at all. Allowing the government to obtain an obstruction conviction for, say, "evasive" inaction where there is no proof of a substantial tax deficiency, wrongly creates a crime that Congress never intended.

C. The Government's Interpretation Allows It To Tack A § 7212(a) Charge On To Almost Any Other Core Tax Crime.

Even apart from those instances in which the government could use § 7212(a) to transform a misdemeanor into a felony, or avoid proof of the elements of a felony, the government's reading presents the additional problem that it transforms obstruction into an add-on statute, capable of being charged in conjunction with almost any core tax felony. Tax evasion, as noted, requires the government to prove an evasive act and a tax deficiency. With that proof, a § 7212(a) obstruction charge could be stacked onto every § 7201 prosecution. The same conclusion holds for every conviction under the tax fraud statute. And indeed, the government is increasingly charging obstruction in cases where it charges other felonies. *See, e.g., United States v. Morris*, 3 F. App'x 223, 224 (6th Cir. 2001);

United States v. Anderson, 384 F. Supp. 2d 32, 35 (D.D.C. 2005).

A criminal provision should not be read to be duplicative of a broad swath of more narrowly-defined crimes. *See, e.g.*, *Yates*, 135 S. Ct. at 1085 ("We resist a reading of §1519 that would render superfluous an entire provision passed in proximity as part of the same Act."). That conclusion is particularly warranted in this case given that there is not an iota of evidence that Congress intended § 7212(a) to function as an all-purpose tax crime, capable of being charged in conjunction with other tax felonies or misdemeanor on the books. On the contrary, as discussed above, the text and legislative history of the provision show that Congress intended it to be focused on the specific evils of interfering with IRS officers or known proceedings.

III. Section 7212(a)'s Corrupt *Mens Rea* Requirement Does Not Justify The Government's Interpretation.

In its opposition to certiorari, the government placed substantial weight on the argument that its interpretation of § 7212(a) does not sweep unduly broadly because the statute requires proof of "corrupt" conduct. BIO 11-12. That argument is misguided for several reasons.

First, as explained above, the corrupt *mens rea* requires the government to prove only that the defendant acted to obtain some unlawful benefit. As a result, that *mens rea* does not save the provision from swallowing up the numerous willful misdemeanor crimes in the Code. Because of the essential similarity between

the government's definitions of willfulness and corruption, nearly every instance in which a taxpayer willfully fails to maintain required documents, fails to make a return, or engages in any of other acts that Congress classified as a misdemeanor in the Code could easily be re-characterized as felony obstruction.

Second, as this case shows, imposing a corrupt *mens rea* standard on an amorphous obstruction provision does not meaningfully restrain the sweep of the statute or the potential for prosecutorial abuse. As the dissenters below put it,

> the jury charge allowed [Marinello to be convicted] on the grounds, variously, that Marinello did not keep adequate records; that, having kept them, he destroyed them; or that, having kept them and preserved them from destruction, he failed to give them to his accountant .... If this is the law, nobody is safe.

Pet. App. 42a

There truly is no safety in a law that allows a prosecutor to look back and decide that an individual – who violated no other recordkeeping requirement – nevertheless committed a felony by failing to keep more copious records or, even more extraordinarily, failing to give "complete" information to an accountant who did not communicate with the IRS. One could always keep more records or give more information to one's accountant, and those omissions presumably could always be said to hinder the IRS should it choose at some subsequent point to investigate. Indeed, if the statute has the scope articulated by the government, then most

Americans have doubtlessly committed the crime's *actus reus* many times over. At that point, all the prosecutor needs to do is allege that the individual failed to do more because he was seeking to hinder the IRS's assessment efforts or some other unlawful benefit. That is an allegation that is easy to make, and allows an "overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*." Pet. App. 45a.

Recordkeeping is hardly the only sphere in which the government's interpretation of obstruction poses dangers. Individuals and businesses make daily decisions about how they organize their financial undertakings. Congress did not impose a free-standing obligation on taxpayers to make their finances maximally easy for the government to parse. A business, for example, might choose to operate through a complex chain of subsidiaries, which is conduct that is perfectly legal (and common).

Should that otherwise legal decision make it more difficult, however, for the IRS to assess the business's tax liability, the only barrier standing between the taxpayer and a felony conviction is the corruption requirement, which is simple to allege as the government can argue that the defendant's actions were taken for the purpose of avoiding taxes. The result will be that individuals and businesses will shy away from legitimate business activity – including legitimate tax minimization activity – out of concern that their activities could be the subject of a felony obstruction charge. *Cf. McDonnell*, 136 S. Ct. at 2372 (government's broad view of *quid pro quo* "would likely chill federal

officials' interactions with the people they serve and thus damage their ability effectively to perform their duties." (internal quotation marks and citation omitted)).

Third, and relatedly, it is precisely these kinds of concerns that led this Court to construe "corrupt" obstruction provisions narrowly in other cases. For example, the obstruction of justice provision in *Aguilar* prohibited "corrupt[]" obstruction of the "due administration of justice." 515 U.S. at 598 (quoting 18 U.S.C. § 1503). The government argued that the provisions swept broadly to include any false statement to an investigator and that § 1503's obstruction provision did not require the government to prove the statements would be used in a judicial proceeding. But the Court rejected this argument, holding that the statute's "corrupt" mens rea requirement did not give the government carte blanche to charge any conduct that might bear a resemblance to acting "corruptly." 515 U.S. at 597.

Instead, the Court construed the provision to allow the government to prosecute only those "corrupt" acts which have a "nexus," *i.e.*, "a relationship in time, causation, or logic," to judicial proceedings. *Aguilar*, 515 U.S. at 599. Although the government argued the statute pertained to any "corrupt" behavior based on the plain language, the Court found the language "a good deal less clear" than is "usually require[d] in order to impose criminal liability" on a class of conduct as broad as the government sought. *Id.* at 602.

A decade later, this Court again prohibited the government from relying on a "corrupt" *mens rea* element to justify a broad reading of a similar

obstruction statute in *Arthur Andersen*. The case was appealed, in part, based on jury instructions that defined "corruptly" as "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding." Brief for the United States on Writ of Certiorari at i, *Arthur Andersen*, 544 U.S. 696, 2005 WL 738080. The government argued the instructions sufficiently delineated what actions could be charged under the statute. *Id.* at 26-29, 2005 WL 738080. The Court rejected this view, noting that, "[b]y definition, anyone who innocently persuades another to withhold information from the Government 'get[s] in the way of the progress of' the Government," which effectively "diluted the meaning of 'corruptly' so that it covered innocent conduct." 544 U.S. at 706-07 (alteration in original) (quoting Webster's 3d 1132). Just as in *Aguilar*, this Court held that the government could not prosecute all actions that might be "corrupt," but only those for which there is a nexus between the "corrupt" conduct and a particular proceeding. *Id.* at 696.

In short, by giving obstruction its proper scope – corrupt actions taken directly against IRS officers or in the context of IRS proceedings – the statute is properly limited and tied to the particular misconduct that Congress sought to curb.

IV. To The Extent The Court Finds § 7212(a) Ambiguous, The Rule Of Lenity Warrants Reversal.

The text, structure, and purpose of § 7212(a) all support Marinello's construction of the statute. But to the extent this Court finds the provision to be

ambiguous, that "ambiguity ... should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Section 7212(a) is a felony criminal provision that the government claims covers a broad swath of conduct, including conduct that Congress has expressly specified elsewhere amounts to a misdemeanor. *See Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.")

As this Court has repeatedly explained, particularly in the context of obstruction statutes, "before we choose the harsher alternative, [we] require that Congress ... have spoken in language that is clear and definite." *Cleveland*, 531 U.S. at 25 (quoting *United States v. Universal CIT Credit Corp.*, 344 U.S. 218, 222 (1952)); *see also Aguilar*, 515 U.S. at 602 (while literal reading of statute could be read to encompass the government's interpretation, "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability"); *Arthur Andersen*, 544 U.S. at 703 ("We have traditionally exercised restraint in assessing the reach of a federal criminal statutes ... out of concern that `a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." (citations and internal quotation marks omitted)); *Yates*, 135 S. Ct at 1088 (applying rule of lenity).

Thus, just as in *Aguilar*, *Arthur Andersen*, and other cases, this Court should require Congress to speak more clearly before it assumes that Congress intended to make a federal felony out of the broad categories of conduct the government seeks.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

JOSEPH M. LATONA
403 Main Street
716 Brisbane Building
Buffalo, NY 14203

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
DAVID BITKOWER*
MICHAEL E. STEWART
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

*Admitted in New York

September 1, 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 23 2017
OFFICE OF THE CLERK

No. 16-1144

In the Supreme Court of the United States

CARL J. MARINELLO II, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
DAVID A. HUBBERT
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROBERT A. PARKER
Assistant to the Solicitor General
S. ROBERT LYONS
STANLEY J. OKULA, JR.
GREGORY VICTOR DAVIS
GREGORY S. KNAPP
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax code requires proof that the defendant acted with knowledge of a pending Internal Revenue Service investigation or other proceeding.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 10
Argument:
An endeavor to obstruct the due administration of the Internal Revenue Code, in violation of 26 U.S.C. 7212(a), does not require proof of a pending proceeding 13
I. The omnibus clause of Section 7212(a) applies to all corrupt endeavors to obstruct the administration of the tax code 14
A. The "due administration" of Title 26 includes the IRS's responsibilities to ascertain income and to calculate, assess, and collect federal taxes 14
B. An "endeavor" requires a factual nexus between the defendant's obstructive acts and tax administration, but it does not require that specific administrative actions be pending 17
C. Section 7212(a)'s *mens rea* requirements limit the statute's reach 18
D. The purpose of Section 7212(a)'s omnibus clause supports its application to obstructive acts that occur outside the context of a known, pending proceeding 21
II. Petitioner identifies no basis in the text or history of Section 7212(a) for requiring obstruction of a known, pending IRS investigation or enforcement proceeding 25

Table of Contents—Continued: Page

A. The phrase "due administration of this title" in Section 7212(a) is not equivalent to the phrase "due administration of justice" in Section 1503(a) 26
B. Petitioner's other statutory construction arguments lack merit 30
C. The legislative history of Section 7212(a) provides no support for petitioner's reading of the statute 35
D. The rule of lenity does not apply 37
III Petitioner's policy arguments do not support his interpretation of Section 7212(a) 38
A. Section 7212(a) does not impermissibly overlap with other criminal statutes 38
B. Section 7212(a) does not impermissibly "chill" lawful conduct 45
Conclusion 47
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Abramski v. *United States*, 134 S. Ct. 2259 (2014) 22
Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) 32, 33, 34
Arthur Andersen LLP v. *United States*, 544 U.S. 696 (2005) 20, 46
Beecham v. *United States*, 511 U.S. 368 (1994) 32
Berra v. *United States*, 351 U.S. 131 (1956) 39, 40
Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) 15
Chamber of Commerce v. *Whiting*, 563 U.S. 582 (2011) 35
Cheek v. *United States*, 498 U.S. 192 (1991) 19, 20, 42, 47

Cases—Continued: Page

Commissioner v. *First Sec. Bank of Utah*, 405 U.S. 394 (1972) 46
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 35
Dean v. *United States*, 556 U.S. 568 (2009) 25
Direct Mktg. Ass'n v. *Brohl*, 135 S. Ct. 1124 (2015) 16
Hubbard v. *United States*, 514 U.S. 695 (1995) 37
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 35
Kungys v. *United States*, 485 U.S. 759 (1988) 42
Lawson v. *FMR LLC*, 134 S. Ct. 1158 (2014) 14
Lewis v. *City of Chicago*, 560 U.S. 205 (2010) 38
Lopez v. *Gonzales*, 549 U.S. 47 (2006) 35
Lopez v. *Monterey Cnty.*, 525 U.S. 266 (1999) 15
Loughrin v. *United States*, 134 S. Ct. 2384 (2014) 38
McDonnell v. *United States*, 136 S. Ct. 2355 (2016) 33, 46
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 37
Moskal v. *United States*, 498 U.S. 103 (1990) 37
Ocasio v. *United States*, 136 S. Ct. 1423 (2016) 37
Octane Fitness, LLC v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) 14
Pettibone v. *United States*, 148 U.S. 197 (1893) 27, 28
Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 34
Rosenberg v. *United States*, 346 U.S. 273 (1953) 39
Russell Motor Car Co. v. *United States*, 261 U.S. 514 (1923) 32
S. D. Warren Co. v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) 32, 33
Sansone v. *United States*, 380 U.S. 343 (1965) 25, 39, 40, 44
Scheidler v. *National Org. for Women, Inc.*, 547 U.S. 9 (2006) 29

Cases—Continued: Page

Spies v. *United States*, 317 U.S. 492 (1943) 22, 39, 40, 42, 43
United States v. *Aguilar*, 515 U.S. 593 (1995) ..... *passim*
United States v. *Batchelder*, 442 U.S. 114 (1979) 39, 41, 43, 44
United States v. *Beacon Brass Co.*, 344 U.S. 43 (1952) 39, 41
United States v. *Bisceglia*, 420 U.S. 141 (1975) 16, 22
United States v. *Bishop*, 412 U.S. 346 (1973) 21, 39, 40, 42, 43, 47
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 15
United States v. *Correll*, 389 U.S. 299 (1967) 15
United States v. *Crim*, 451 Fed. Appx. 196 (3d Cir. 2011), cert. denied, 566 U.S. 927, and 132 S. Ct. 2682 (2012) 23
United States v. *Cueto*, 151 F.3d 620 (7th Cir. 1998), cert. denied, 526 U.S. 1016 (1999) 20
United States v. *Feola*, 420 U.S. 671 (1975) 21
United States v. *Floyd*, 740 F.3d 22 (1st Cir.), cert. denied, 135 S. Ct. 124 (2014) 9, 19
United States v. *Frank*, 354 F.3d 910 (8th Cir. 2004) 20
United States v. *Gilliland*, 312 U.S. 86 (1941) 33
United States v. *Hardaway*, 731 F.2d 1138 (5th Cir.), cert. denied, 469 U.S. 865 (1984) 45
United States v. *Kassouf*, 144 F.3d 952 (6th Cir. 1998) 7
United States v. *Madoch*, 108 F.3d 761 (7th Cir. 1997) 23
United States v. *Martin*, 747 F.2d 1404 (11th Cir. 1984) 37

Cases—Continued: Page

United States v. *Massey*, 419 F.3d 1008 (9th Cir. 2005), cert. denied, 547 U.S. 1132 (2006) 9
United States v. *Mitchell*, 985 F.2d 1275 (4th Cir. 1993).....23, 36
United States v. *Noveck*, 273 U.S. 202 (1927).....40
United States v. *Pansier*, 576 F.3d 726 (7th Cir. 2009).....30
United States v. *Popkin*, 943 F.2d 1535 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992) 22, 43
United States v. *Reeves*, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985).....19, 42, 43
United States v. *Richardson*, 676 F.3d 491 (5th Cir. 2012).....20
United States v. *Russell*, 255 U.S. 138 (1921).....17, 28
United States v. *Saldana*, 427 F.3d 298 (5th Cir.), cert. denied, 546 U.S. 1067 (2005), and 546 U.S. 1122 (2006) 43
United States v. *Scheuneman*, 712 F.3d 372 (7th Cir. 2013).....9
United States v. *Shabani*, 513 U.S. 10 (1994).....30
United States v. *Sorensen*, 801 F.3d 1217 (10th Cir. 2015), cert. denied, 136 S. Ct. 1163 (2016) 9, 23
United States v. *Wells*, 519 U.S. 482 (1997).....43
United States v. *Westbrooks*, 858 F.3d 317 (5th Cir. 2017), petition for cert. pending, No. 17-5112 (filed July 6, 2017).....9, 23
United States v. *Williams*, 644 F.2d 696 (8th Cir.), cert. denied, 454 U.S. 841 (1981).....36
Whitfield v. *United States*, 543 U.S. 209 (2005).....30
Winship, In re, 397 U.S. 358 (1970).....46
Yates v. *United States*, 135 S. Ct. 1074 (2015).....33, 46

Statutes: Page

Act of Mar. 4, 1909, ch. 321, § 135, 35 Stat. 1113 28
Act of Jan. 13, 1940, ch. 1, § 135(a), 54 Stat. 13 30
Act of June 25, 1948, ch. 645, § 1503, 62 Stat. 769-770 28
Internal Revenue Code of 1954, ch. 736, 68A Stat. 3:
Subtit. F, 68A Stat. 731 15
§§ 6001 *et seq.* 16
§§ 6201 *et seq.* 16
§§ 6301 *et seq.* 16
§ 7201 ..... 8, 25, 40, 41, 44
§ 7203 ..... 2, 5, 25, 40, 42
§ 7205 41
§ 7206(1) 40, 44
§ 7207 ..... 40, 42
§ 7212 (68A Stat. 855) 5, 35, 36, 3a
§ 7212(a) ..... *passim*, 3a
§ 7212(b) 45, 4a
§§ 7601 *et seq.* 16
Tax Reform Act of 1984, Pub. L. No. 98-369,
Div. A, § 159(a), 98 Stat. 696 40
Rev. Stat. § 5399 (1878) 28, 29
16 U.S.C. 973c(b)(5) 35
18 U.S.C. 335 35
18 U.S.C. 1014 43
18 U.S.C. 1503 ..... 20, 25, 28, 29, 1a
18 U.S.C. 1503(a) 11, 12, 26, 28, 29, 33, 1a
18 U.S.C. 1505 ..... 19, 29, 30, 2a
18 U.S.C. 1512(b) 20
18 U.S.C. 1515(b) 19, 3a
18 U.S.C. 1519 ..... 33, 46
21 U.S.C. 467b(a)(1) 35
49 U.S.C. 20109(a) 35

Miscellaneous: Page

Black's Law Dictionary:
4th ed. 1951 14
10th ed. 2014 26
H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. (1984) 40
H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947) 29
H.R. Rep. No. 1143, 76th Cong., 1st Sess. (1939) 30
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954) 36
S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 36
3 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* (2017) 19, 21
Webster's New International Dictionary of the English Language (2d ed. 1947) 14

In the Supreme Court of the United States

No. 16-1144

CARL J. MARINELLO, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 839 F.3d 209.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2016. A petition for rehearing was denied on February 15, 2017 (Pet. App. 40a-50a). The petition for a writ of certiorari was filed on March 21, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of corruptly endeavoring to obstruct or impede the due administration of the Internal Revenue Code, in violation of 26 U.S.C. 7212(a); and eight counts of willfully failing to file tax returns, in violation of 26 U.S.C. 7203. The district court sentenced petitioner to 36 months of imprisonment, to be followed by one year of supervised release. The court of appeals affirmed. Pet. App. 1a-39a.

1. Petitioner owned and managed Express Courier Group/Buffalo, Inc. (Express Courier), a New York corporation that operated a freight service between the United States and Canada. Pet. App. 3a. For over a decade, petitioner failed to file corporate and personal income tax returns. *Id.* at 4a. Petitioner paid his employees in cash and did not issue them or himself the documents necessary to report their income to the Internal Revenue Service (IRS). *Id.* at 3a-4a. He systematically destroyed most of Express Courier's records, including bank account statements, employee work statements, receipts, bills, and other documents necessary to calculate his business income and file tax returns. *Id.* at 3a. Petitioner also routinely diverted corporate funds for his personal use, including by paying his mortgage and his mother's living expenses from business accounts and by having the company make weekly cash "contributions" to his wife. *Id.* at 4a.

In 2004, the IRS received an anonymous letter alleging that petitioner was engaged in an unlawful scheme to avoid paying taxes. Pet. App. 4a. The letter stated, among other things, that petitioner repeatedly issued business checks "to two fictitious individuals totaling

$3000 to $5000 weekly," which he would then endorse using the fictitious payee's name and cash at a bank where he "knew" the teller. Gov't Ex. 3.05, at 2; see Trial Tr. 143. The letter further alleged that all of petitioner's expenses, "business and personal," were "paid out of the business account." *Ibid.*

Based on that tip, the IRS launched a preliminary investigation into petitioner's tax reporting. Pet. App. 4a. The investigation revealed that petitioner had apparently never filed a tax return. Gov't Ex. 16.01, at 2; see Trial Tr. 151. The IRS concluded that, although "at least some unreported income" was likely, it could not determine from the information then available whether the amount was significant or whether other allegations in the anonymous letter were true. Gov't Ex. 16.01, at 2; see Trial Tr. 149-150. Petitioner had no knowledge of that investigation. Pet. App. 4a.

In 2005, petitioner admitted to his attorney that he had not filed tax returns for several years. Pet. App. 4a. The attorney told petitioner that failing to file tax returns was improper and referred him to a certified public accountant, Allan Wiegley. *Ibid.* Wiegley, too, told petitioner that he needed to file both personal and corporate tax returns and pay taxes, and that he "ha[d] to get caught up" on any past failures to file. Trial Tr. 328-330; see Pet. App. 4a. Wiegley also explicitly warned petitioner not to destroy Express Courier's business records. Trial Tr. 330, 346.

Wiegley instructed petitioner to give him Express Courier's records, including "records of business receipts and expenses," so that Wiegley could prepare a tax return and submit the necessary information to the IRS. Pet. App. 4a; see Trial Tr. 328. Petitioner, who had destroyed the records, never did so. Pet. App. 4a.

Wiegley informed petitioner that the lack of documents made it impossible to calculate petitioner's income or to prepare a tax return, and he therefore refused to "be [petitioner's] accountant." Trial Tr. 330-331. Petitioner then resumed his practice of systematically destroying his business records and not filing tax returns. Pet. App. 5a; see Trial Tr. 192-194. He also continued to divert Express Courier's income to personal bank accounts, to use corporate funds to pay his personal expenses, and to pay his employees in cash without any recordkeeping or reporting to the IRS. See Trial Tr. 174-176, 181-188, 223-224, 400-409.

In 2009, the IRS reopened its investigation of petitioner. Pet. App. 5a. During an interview with an IRS special agent at petitioner's home, petitioner stated that he could "not remember the last time he filed an income tax return." Trial Tr. 170; see Pet. App. 5a. Petitioner initially told the agent that he did not file personal or corporate tax returns because he and Express Courier made less than $1000 per year, Pet. App. 5a, but that was false: in each year between 2005 and 2008, for example, Express Courier took in hundreds of thousands of dollars in gross receipts and petitioner diverted tens of thousands of dollars from the corporation's coffers to pay his personal expenses. *Ibid.*

Petitioner eventually admitted to the IRS agent that he knew he was supposed to file tax returns and pay taxes but that he "never got around to it." Trial Tr. 172; see Pet. App. 5a. Petitioner also acknowledged that he took money from Express Courier to pay his personal expenses and that he had systematically destroyed Express Courier's records over the course of several years. Pet. App. 5a. Petitioner told the agent that he destroyed the records because it was "the easy way out"

and was "what [he had] been doing all along." Trial Tr. 194; see Pet. App. 6a.

2. A federal grand jury charged petitioner with one count of corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue Code, in violation of 26 U.S.C. 7212(a) (Count 1); and eight counts of willfully failing to file individual and corporate tax returns, in violation of 26 U.S.C. 7203 (Counts 2 through 9). Superseding Indictment 1-10.

Count 1 alleged a violation of the "omnibus clause" of Section 7212, which makes it a crime to "corruptly * * * endeavor[] to obstruct or impede, the due administration" of the Internal Revenue Code. 26 U.S.C. 7212(a). The grand jury alleged that petitioner violated that provision by, "among other thing[s]":

(1) "failing to maintain corporate books and records" for Express Courier;

(2) "failing to provide [petitioner's] accountant with complete and accurate information" about petitioner's personal income and Express Courier's business income;

(3) "destroying, shredding and discarding business records of Express Courier";

(4) "cashing business checks received by Express Courier";

(5) "hiding income earned by Express Courier in personal and other non-business bank accounts";

(6) "transferring [Express Courier's] assets to a nominee" (*i.e.*, his wife);

(7) "paying employees of Express Courier with cash"; and

(8) using money from Express Courier's business accounts "to pay personal expenses."

Superseding Indictment 1-2; see Pet. App. 6a-7a.

At trial, petitioner conceded that he did all of those things, but disputed whether he did so with criminal intent. Pet. App. 32a n.14 (citing Trial Tr. 51-56). The district court instructed the jury that, to convict petitioner on Count 1, it needed to find unanimously and beyond a reasonable doubt that he "acted corruptly," meaning that he "act[ed] with the intent to secure an unlawful advantage or benefit, either for [him]self or for another," and that he did so "with the intent to impede or obstruct the due administration of the Internal Revenue laws." Trial Tr. 470. The court also instructed the jury that it needed to find that petitioner engaged in an obstructive "endeavor," meaning that he "knowingly and intentionally act[ed], or knowingly and intentionally ma[de] any effort which ha[d] a reasonable tendency to bring about the desired result." *Ibid.* With respect to the various means of the corrupt endeavor charged in Count 1, the district court instructed the jury (over petitioner's objection) that it was required to find unanimously "that at least one" of the means was proved but that it "need not agree that the same one has been proved." *Id.* at 471; see Pet. App. 9a. Petitioner was convicted on all counts. Pet. App. 10a.

3. Petitioner filed a post-verdict motion for a judgment of acquittal or a new trial. See D. Ct. Doc. 92 (Sept. 9, 2014). In that motion, petitioner admitted that the government proved several of the means of the corrupt endeavor charged in Count 1, including that he systematically destroyed records and other documents, diverted corporate funds for his personal use, transferred corporate assets to his wife, paid his employees in cash,

and failed to maintain corporate tax records. *Id.* at 4; see Pet. App. 56a.

Nonetheless, petitioner argued, for the first time, that a conviction under the omnibus clause of Section 7212(a) requires proof that "the defendant knew he was under investigation by the IRS and intended to corruptly interfere with that investigation." D. Ct. Doc. 92, at 8. Because the government's evidence at trial established that petitioner endeavored to obstruct the IRS's ability to ascertain his income and to calculate, assess, and collect the taxes he owed, but did not show that petitioner endeavored to obstruct the IRS's criminal investigation after he learned about it, petitioner contended that the government failed to prove an offense under Section 7212(a). *Id.* at 10.

The district court denied petitioner's motion. Pet. App. 51a-57a. The court noted that the omnibus clause of Section 7212(a) applies to corrupt endeavors "to impede or obstruct the due administration of the Internal Revenue laws," and not just known IRS investigations. *Id.* at 56a; see *ibid.* ("Knowledge of a pending investigation is not an essential element of the crime."). The court acknowledged that the Sixth Circuit reached a contrary result in *United States* v. *Kassouf*, 144 F.3d 952 (1998), but concluded that *Kassouf*'s interpretation had been "rejected by other circuits" and was unpersuasive. Pet. App. 56a.

4. At sentencing, the district court adopted the Probation Office's determination that, from 2005 to 2008, petitioner failed to report gross business income totaling over $2.3 million, resulting in an estimated tax loss to the government of over $598,000. Sent. Tr. 9; see

Presentence Investigation Report ¶¶ 27-32, 35.[1] In defending that tax-loss calculation, the government noted that petitioner's systematic destruction of his business records made it impossible to determine the actual amounts of income or loss, and that the resulting inability to prove a specific tax deficiency was the reason why the government declined to press a more serious charge of tax evasion under 26 U.S.C. 7201. D. Ct. Doc. 107, at 10 (Feb. 26, 2015) (noting that the decision to charge petitioner with obstruction instead of tax evasion "was directly related to the fact that [petitioner] regularly destroyed, discarded and/or failed to maintain business records"); *id.* at 11 (noting that, as a result of petitioner's concealment of business assets in personal accounts, most "bank expenditures could not readily be classified as either personal or business expenses" and that petitioner "destroyed any books or records that would clarify the issue").

After considering the advisory sentencing range under the Sentencing Guidelines and other relevant factors, the district court sentenced petitioner to 36 months of imprisonment on the obstruction count and concurrent 12-month sentences on the failure-to-file counts. Sent. Tr. 12-14, 29. The court noted that petitioner clearly knew "that he had the obligation" to preserve business records, report income, and pay taxes, and that he deliberately refused to do so as part of a "defiant stand" "to thwart the efforts of the government to collect taxes." *Id.* at 14, 28-29.

5. The court of appeals affirmed. Pet. App. 1a-39a. As relevant here, petitioner renewed his argument that

---

[1] Those estimates were based on payment records the government obtained from some of Express Courier's clients. See, *e.g.*, Trial Tr. 387-400.

a conviction under the omnibus clause of Section 7212(a) requires proof that the defendant acted with knowledge of a pending IRS investigation. Pet. C.A. Br. 23-25.

The court of appeals rejected petitioner's argument and affirmed his convictions. Pet. App. 17a-30a. The court noted that, apart from the Sixth Circuit's decision in *Kassouf*, every court of appeals to have considered the question had held that Section 7212(a)'s omnibus clause "criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation." *Id.* at 28a; see, *e.g.*, *United States* v. *Westbrooks*, 858 F.3d 317, 322-324 (5th Cir. 2017), petition for cert. pending, No. 17-5112 (filed July 6, 2017); *United States* v. *Sorensen*, 801 F.3d 1217, 1231-1233 (10th Cir. 2015), cert. denied, 136 S. Ct. 1163 (2016); *United States* v. *Floyd*, 740 F.3d 22, 32 & n.4 (1st Cir.), cert. denied, 135 S. Ct. 124 (2014); *United States* v. *Scheuneman*, 712 F.3d 372, 380 (7th Cir. 2013); *United States* v. *Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005), cert. denied, 547 U.S. 1132 (2006). As the court explained, Section 7212(a) "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities," and because "the IRS does duly administer the tax laws even before initiating a proceeding," a defendant need not be "aware[] of a particular [IRS] action or investigation" at the time he corruptly engages in acts of obstruction. Pet. App. 25a-26a (citations omitted; second brackets in original).

6. Petitioner sought rehearing en banc, which the court of appeals denied. Pet. App. 41a. Judge Jacobs dissented from the denial of rehearing en banc, arguing that *Kassouf*'s interpretation of Section 7212(a) was correct. *Id.* at 41a-50a.

SUMMARY OF ARGUMENT

The "omnibus clause" of Section 7212(a) of Title 26 makes it a crime to corruptly endeavor to obstruct or impede "the due administration" of the Internal Revenue Code. The due administration of the Code includes the IRS's determination of a taxpayer's income and its calculation, assessment, and collection of her taxes. Contrary to petitioner's interpretation—which limits the phrase "due administration" of the Code to specific types of known, pending proceedings—an individual can violate Section 7212(a) by taking corrupt action that is intended and likely to obstruct anticipated IRS administrative action to calculate, assess, and collect taxes.

I. A. The ordinary meaning of the phrase "due administration of this title" in Section 7212(a) encompasses the full range of the IRS's powers in administering the Internal Revenue Code. Those powers include gathering information that taxpayers are required to report to the IRS; using that information to ascertain income; calculating, assessing, and collecting any taxes that may be due; and conducting audits, investigations, and similar proceedings to enforce the tax code against potential violators. A defendant who, with the requisite *mens rea*, endeavors to obstruct the IRS's ability to discharge those administrative functions commits a crime under Section 7212(a).

B. Section 7212(a) requires either actual obstruction or an "endeavor" to obstruct administration of the tax code. An endeavor must involve conduct that is likely to result in obstruction of the due administration of the code. But a particular IRS action need not be pending, nor must the defendant *know* of a pending action, in order to anticipate one and seek to obstruct it.

The administration of the tax code occurs on a regular, predictable schedule, and every taxpayer can foresee the likely effect of deliberately obstructive acts.

C. A defendant's endeavor does not violate Section 7212(a) unless he acts "corruptly" and intends to obstruct the due administration of the tax code. Those *mens rea* requirements ensure that a defendant is aware that his obstructive acts are directed at the IRS's administration of the tax code, that he intends to obstruct those functions, and that he does so with the specific intent of obtaining a benefit or advantage that he knows to be illegal. The *mens rea* elements of Section 7212(a) readily distinguish purposeful tax violators from those who lack a culpable intent to obstruct and ensure that the provision is not a trap for the unwary.

D. This interpretation furthers Section 7212(a)'s purpose to protect the integrity of our voluntary tax reporting system. The income tax system depends upon taxpayers voluntarily complying with their responsibilities and self-reporting their income in good faith. Petitioner's interpretation of the statute would effectively foreclose most obstruction prosecutions involving schemes to obstruct the IRS's initial calculation and assessment activities. It would also reward those, like petitioner, who so thoroughly obstruct the calculation, assessment, and collection phases of tax administration that other crimes cannot later be proved.

II. A. Petitioner draws an analogy to 18 U.S.C. 1503(a), which proscribes corrupt endeavors to obstruct or impede "the due administration of justice" and requires proof of a known, pending judicial proceeding. Section 1503(a)'s pending-proceeding requirement stems from that statute's reference to "justice," not the

"due administration" language that also appears in Section 7212(a). Moreover, Section 1503(a) is merely a recodified version of an earlier obstruction statute that was explicitly limited to the due administration of justice *in a court*. Section 7212(a) has no similar lineage.

B. Petitioner's reliance on principles of statutory construction is misplaced. *Noscitur a sociis* does not support petitioner's interpretation because the first clause of Section 7212(a) covers acts that intimidate or impede IRS employees in the exercise of their duties, without limitation to a known, pending investigation or other proceeding. And *noscitur a sociis* does not apply to statutes, like this one, that define two offenses in separate clauses, even if one is broader than the other. Petitioner further argues that the government's interpretation of the omnibus clause would render the first clause superfluous. The breadth of the omnibus clause, however, is evident from the statutory language and is common in a scheme such as this.

C. The legislative history of Section 7212(a) provides no support for petitioner's interpretation of the statute. The sparse history of that provision focuses almost exclusively on Section 7212(a)'s first clause and does not purport to interpret the omnibus provision.

D. The rule of lenity has no application. The meaning of Section 7212(a)'s omnibus clause is clear. At the very least, the clause does not contain the sort of grievous ambiguity that would give rise to lenity concerns.

III. A. Petitioner's policy arguments are likewise unpersuasive. He contends that the government's interpretation of Section 7212(a)'s omnibus clause would impermissibly overlap with other criminal provisions. This Court has repeatedly held, however, that overlap in the scope or elements of criminal statutes is

permissible, particularly among the various felonies and misdemeanors defined in the Internal Revenue Code. And in any event, the elements of Section 7212(a) differ from those in other criminal tax provisions.

B. Petitioner also contends that the government's interpretation of the omnibus clause would unfairly chill lawful conduct. Neither he nor his supporting *amici* identify any lawful conduct that has been or would likely be chilled by a plain-meaning application of Section 7212(a). The statute's *mens rea* requirements provide ample protection to those who make mistaken judgments about what the tax code allows, and such concerns would not justify an atextual reading of the statute in any event.

ARGUMENT

AN ENDEAVOR TO OBSTRUCT THE DUE ADMINISTRATION OF THE INTERNAL REVENUE CODE, IN VIOLATION OF 26 U.S.C. 7212(a), DOES NOT REQUIRE PROOF OF A PENDING PROCEEDING

The omnibus clause of 26 U.S.C. 7212(a) provides that "[w]hoever * * * corruptly or by force or threats of force * * * obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title," has committed a crime punishable (in most cases) by up to three years of imprisonment. *Ibid.* A person violates that statute by endeavoring, with the requisite *mens rea*, to obstruct or impede the IRS's ability to administer the Internal Revenue Code, including by interfering with the IRS's efforts to ascertain income and to calculate, assess, and collect taxes that are lawfully due to the United States. Nothing in the statute's text, structure, or history limits it to obstruction of a specific, pending IRS proceeding, "such as an audit or investigation," of which the defendant is aware. Pet. Br. 15.

I. THE OMNIBUS CLAUSE OF SECTION 7212(a) APPLIES TO ALL CORRUPT ENDEAVORS TO OBSTRUCT THE ADMINISTRATION OF THE TAX CODE

A. The "Due Administration" Of Title 26 Includes The IRS's Responsibilities To Ascertain Income And To Calculate, Assess, And Collect Federal Taxes

When interpreting a statute, this Court looks first to the statutory language, "giving the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (citation omitted). If the statutory language is plain and unambiguous, the Court's "analysis begins and ends with the text." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755 (2014). Here, the meaning of the phrase "due administration of this title" is controlled by the ordinary sense of those words and the statutory scope of the IRS's duties.

1. As the court of appeals observed, the omnibus clause of Section 7212(a) "does not contain any * * * reference to IRS actions, investigations, or proceedings." Pet. App. 24a. Instead, it reaches corrupt endeavors to obstruct or impede the "due administration" of the Internal Revenue Code. 26 U.S.C. 7212(a). The ordinary meaning of that term is the same today as it was when the statute was enacted. "Due" means "rightful, proper, or just." *Webster's New International Dictionary of the English Language* 796 (2d ed. 1947) (*Webster's*); see *Black's Law Dictionary* 589 (4th ed. 1951) (*Black's*) ("[j]ust; proper; regular; lawful"). "Administration" means the "[a]ct or process of administering," including "[t]he managing or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like." *Webster's* 34; see *Black's* 65 ("practical management and direction of the executive department, or of the public machinery or

functions"); accord *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 278 (1999) (noting that the statutory term "administer" has been "consistently defined" to mean "manage the affairs of" and "have executive charge of") (citations omitted).

A straightforward reading of the phrase "due administration of this title" in Section 7212(a) thus encompasses the IRS's lawful exercise of its powers in carrying out its statutory mandate under the Internal Revenue Code. See *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 218-219 (2001) (noting that "the administration of the tax laws" is vested in the IRS and includes the application of IRS rules and regulations that "implement the [agency's] congressional mandate in some reasonable manner") (quoting *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967)).

2. Congress gave the IRS a range of administrative responsibilities that are defined by law. They include not only the types of actions to which petitioner would confine Section 7212(a)—formal proceedings "such as an audit or investigation," Pet. Br. 15—but also the determination of income and the calculation, assessment, and collection of taxes based on taxpayer self-reporting.

a. The IRS's administrative duties and the requirements imposed on taxpayers to assist the agency in carrying out those duties are set forth in Subtitle F of the Internal Revenue Code, entitled "Procedure and Administration."[2] Each of these steps is "essential to efficient and fair administration of the tax laws." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 596 (1983). Before the IRS begins its administrative process, the

---

[2] The title of Subtitle F was adopted by Congress in the Internal Revenue Code of 1954. See ch. 736, Subtit. F, 68A Stat. 731.

Code requires taxpayers to file returns and to self-report information to the IRS to ensure that the agency receives accurate information concerning income and potential tax liability. See 26 U.S.C. 6001 *et seq.*; cf. *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1129-1130 (2015) (noting that "the Federal Tax Code has long treated information gathering as a phase of tax administration procedure"). Based on that information, the IRS calculates and assesses the amount of taxes that may be owed. See 26 U.S.C. 6201 *et seq.*; cf. *Brohl*, 135 S. Ct. at 1130 (noting that "[a]ssessment" is another "step in the process" of tax administration, involving the calculation and recording of a taxpayer's liability "after information relevant to the calculation of that liability is reported to the taxing authority"). The IRS also administers the Code by collecting taxes that are due. 26 U.S.C. 6301 *et seq.*; cf. *Brohl*, 135 S. Ct. at 1131 (explaining that "'collection' is a separate step in the taxation process from assessment and the reporting on which assessment is based").

In addition to those functions, the IRS conducts audits and investigations to ensure compliance with the tax laws. See 26 U.S.C. 7601 *et seq.*; cf. *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975) (noting the IRS's "broad mandate to investigate and audit persons who may be liable for taxes") (internal quotation marks and emphasis omitted). But the "due administration" of the tax code that Section 7212(a) protects begins before those possible actions.

b. The Internal Revenue Code and this Court's cases thus reflect a uniform understanding of what the "due administration" of the tax laws includes—an understanding that comports with the ordinary meaning of those words. Audits and investigations are examples

of "due administration," but they are not the only functions that come within that provision. Petitioner's more restrictive definition has no basis in the statutory text.

B. An "Endeavor" Requires A Factual Nexus Between The Defendant's Obstructive Acts And Tax Administration, But It Does Not Require That Specific Administrative Actions Be Pending

Section 7212(a)'s omnibus clause applies to both completed acts of obstruction and "endeavors" to obstruct. 26 U.S.C. 7212(a). To be convicted of an "endeavor," as petitioner was, the government must prove that the defendant acted "in a manner that is likely to obstruct," even though he may have been "foiled in some way." *United States* v. *Aguilar*, 515 U.S. 593, 601-602 (1995) (construing 18 U.S.C. 1503(a)); see *United States* v. *Russell*, 255 U.S. 138, 143 (1921) (defining an "endeavor" as an "effort or essay to accomplish the evil purpose that the section was enacted to prevent"); cf. Trial Tr. 470 (instructing jury that an "endeavor" requires proof of a knowing and intentional act or effort "which has a reasonable tendency to bring about the desired result" of obstructing the tax code).

Section 7212(a) thus requires either actual obstruction or an effort to obstruct that has "the natural and probable effect of interfering with the due administration" of the Internal Revenue Code. *Aguilar*, 515 U.S. at 599 (citation omitted). It therefore ensures an objective factual "nexus" between the defendant's conduct and the IRS's administrative acts. *Ibid.*

This does not mean, however, that those administrative acts must be pending at the time the defendant engages in obstructive conduct. Unlike the judicial or grand jury proceedings at issue in *Aguilar*, which arise only when triggered by specific action, many of the

IRS's administrative actions occur regularly, on a predictable schedule, and apply broadly to all taxpayers. The basic obligation to file an income tax return is an annual ritual, required by law. Individuals therefore readily anticipate administrative action by the IRS every year during tax season. No plausible claim could be made that an endeavor to obstruct the IRS's ability to identify income and calculate, assess, and collect taxes would not have a likely effect on the administration of the Code simply because the individual engaged in that conduct before Tax Day.

Indeed, obstructing those forms of administration often *requires* action before the IRS's administrative process focuses on the specific taxpayer. An obstructive endeavor like petitioner's—involving the destruction of records, concealment of income, and structuring of corporate affairs to avoid complying with legal duties—would be likely to succeed only if it occurred before the start of the administrative process that commences once the taxpayer reports his income. Efforts to obstruct the IRS's calculation and assessment of taxes after that process begins would in most cases be futile because, at that point, the IRS will have already collected the information necessary to carry out those administrative functions. A "known proceeding" requirement (Pet. Br. 39) would thus frustrate the protection Section 7212(a) is designed to afford to critical IRS administrative actions.

C. Section 7212(a)'s *Mens Rea* Requirements Limit The Statute's Reach

1. Although Section 7212(a) applies to all phases of the IRS's administration of the tax laws, absent force or the threat of force, a tax-obstruction offense does not exist unless the defendant acts "corruptly." 26 U.S.C.

7212(a). Consistent with the "special treatment" generally afforded to *mens rea* requirements in criminal tax statutes, *Cheek* v. *United States*, 498 U.S. 192, 200 (1991), the courts of appeals have uniformly interpreted the "corruptly" element in Section 7212(a) to require proof that the defendant "act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person." *United States* v. *Floyd*, 740 F.3d 22, 31 (1st Cir.) (citing cases from nine other circuits), cert. denied, 135 S. Ct. 124 (2014); see Trial Tr. 470 (same); 3 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* ¶ 59-33 (2017) (same).

The specific intent to obtain an unlawful benefit or advantage subsumes two concepts. First, it requires that the defendant knows that his obstructive conduct is "directed at efforts to bring about a particular advantage such as impeding the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records." *United States* v. *Reeves*, 752 F.2d 995, 998 (5th Cir.), cert. denied, 474 U.S. 834 (1985). Second, it requires that the defendant be aware that the advantage is contrary to law. See *Floyd*, 740 F.3d at 31 ("unlawful benefit").

The meaning of "corruptly" in Section 7212(a) is, in these respects, more specific and demanding than the meaning of that term as applied in other, more general obstruction statutes. For example, Congress has defined the term "corruptly" in 18 U.S.C. 1505 (prohibiting corrupt endeavors to obstruct agency proceedings) to mean "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. 1515(b). This Court has defined the term

"corruptly" in 18 U.S.C. 1512(b) (prohibiting the corrupt persuasion of another person to withhold information from an "official proceeding") as "wrongful, immoral, depraved, or evil." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 705 (2005). And in the context of the general obstruction-of-justice statute, 18 U.S.C. 1503, courts have defined the term "corruptly" to mean "knowingly and dishonestly," *United States*, v. *Richardson*, 676 F.3d 491, 508 (5th Cir. 2012) (citation omitted); "with an improper or evil motive," *United States* v. *Frank*, 354 F.3d 910, 922 (8th Cir. 2004); or, simply, "with the purpose of obstructing justice," *United States* v. *Cueto*, 151 F.3d 620, 630 (7th Cir. 1998) (citation omitted), cert. denied, 526 U.S. 1016 (1999).

The federal courts' uniform adoption of a more specific and rigorous definition of "corruptly" in Section 7212(a), accords with this Court's interpretation of other *mens rea* requirements in the criminal tax context. In *Cheek*, for example, the Court held that in the context of tax offenses, "willfully" requires proof "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." 498 U.S. at 201. That enhanced mental state requirement reflects this Court's recognition that "the complexity of the tax laws" may make it "difficult for the average citizen to know and comprehend the extent of the[ir] duties and obligations" under those laws, and thus *mens rea* requirements in criminal tax statutes should be interpreted more stringently than in other contexts. *Id.* at 199-200. A similar approach informs the interpretation of "corruptly" under Section 7212(a).

2. Section 7212(a) also requires proof that the defendant acted "with the intent to impede or obstruct the due administration of the Internal Revenue laws." Trial Tr. 470; see 3 Sand ¶¶ 59-32, 59-34 (identifying obstructive intent and acting "corruptly" as separate elements of Section 7212(a)'s omnibus clause). That intent requirement comports with the general principle that, in the obstruction context, Congress is presumed to have "intended criminal liability to be imposed only when a person acted with the specific intent to impede" the government function at issue. *United States* v. *Feola*, 420 U.S. 671, 678 (1975). It is also consistent with the principle that an inchoate offense (such as an endeavor) requires intent to commit the substantive offense. *Id.* at 694; see *Aguilar*, 515 U.S. at 601 (holding that an "endeavor" to obstruct justice requires proof that the defendant "act[ed] with an intent to obstruct justice").

3. The *mens rea* requirements of Section 7212(a) serve the critical function of ensuring that only those who understand the character and import of their actions are punished. A defendant does not violate the statute unless, at minimum, he intentionally endeavors to obstruct the due administration of the tax code with the specific intent to obtain an unlawful benefit or advantage as a result. Those requirements "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." *United States* v. *Bishop*, 412 U.S. 346, 361 (1973).

D. The Purpose Of Section 7212(a)'s Omnibus Clause Supports Its Application To Obstructive Acts That Occur Outside The Context Of A Known, Pending Proceeding

The Court "interpret[s] the relevant words [of Section 7212(a)] not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'"

Abramski v. *United States*, 134 S. Ct. 2259, 2267 (2014) (citation omitted). Here, the structure of the tax laws and the purpose of Section 7212(a) reinforce the conclusion that the statute applies to obstructive acts aimed at anticipated administration of the tax laws.

1. As this Court has observed, "our tax structure is based on a system of self-reporting," requiring the government to "depend[] upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *Bisceglia*, 420 U.S. at 145. That system "can function successfully only if those within and near taxable income keep and render true accounts." *Spies* v. *United States*, 317 U.S. 492, 495 (1943). Taxpayers "may prejudice the orderly and punctual administration of the system as well as the revenues themselves" in "many ways," *ibid.*, and it is therefore "necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining unlawful benefits by employing that variety of corrupt methods that is limited only by the imagination of the criminally inclined," *United States* v. *Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991) (citation and internal quotation marks omitted), cert. denied, 503 U.S. 1004 (1992).

2. The critical role of Section 7212(a)'s omnibus clause supports its application to obstructive acts before the IRS has commenced an investigation or other proceeding. Applying the omnibus clause to endeavors to obstruct the "due administration" of the tax code in all its forms, 26 U.S.C. 7212(a), and not just pending IRS audits or investigations, reflects the reality of how the IRS administers the code. Obstructing the IRS's ability to ascertain income and to calculate, assess, and collect taxes undermines the tax system as a whole, including any investigations or other proceedings that might later be brought in

an effort to enforce the law against violators. Indeed, such investigations or other proceedings might be futile if earlier obstructive acts go unpunished.

Large-scale tax-evasion schemes, for example, often involve complicated endeavors to obstruct tax administration by many different means, including some that are explicitly designed to prevent IRS assessment and collection actions from triggering audits and investigations. See *United States* v. *Crim*, 451 Fed. Appx. 196, 200-201 (3d Cir. 2011) (affirming Section 7212(a) conviction of a defendant who promoted the unlawful use of trusts to hide assets and evade income taxes), cert. denied, 566 U.S. 927, and 132 S. Ct. 2682 (2012); cf. *United States* v. *Sorensen*, 801 F.3d 1217, 1221-1222 (10th Cir. 2015) (describing similar scheme), cert. denied, 136 S. Ct. 1163 (2016). The same design underlies the acts of tax-return preparers who systematically create false documents and file fraudulent returns. See, *e.g.*, *United States* v. *Westbrooks*, 858 F.3d 317, 321 (5th Cir. 2017), petition for cert. pending, No. 17-5112 (filed July 6, 2017); *United States* v. *Madoch*, 108 F.3d 761, 763 (7th Cir. 1997). Because such schemes usually occur before IRS investigations or other proceedings begin—and are often specifically designed to avoid such proceedings—they could not be charged as obstruction under petitioner's interpretation even though the perpetrators manifestly intend to obstruct the administration of the tax code and to reap unlawful benefits as a result, often on a massive scale. See *United States* v. *Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) ("It is just such a creative and multi-faceted scheme to evade taxes that the omnibus clause of § 7212 targets.").

3. Requiring "knowledge" of a pending proceeding would have equal potential to frustrate Section 7212(a)'s purpose to protect the administrative functions of the

IRS. As explained, the IRS administers the tax code with predictable regularity, and every taxpayer is aware that she will be subject to the administration of the code on an annual basis. Section 7212(a)'s *mens rea* requirements ensure that a defendant must intend to obstruct that forthcoming administration in order to be convicted under the statute. If a taxpayer must know that she is under current IRS scrutiny in an investigation or other proceeding, however, even a defendant who is aware of a forthcoming audit or investigation, and who actually obstructs that action with the requisite *mens rea*, has not violated the statute. See, *e.g.*, Order at 35-38, *United States* v. *Ogbazion*, No. 15-cr-104 (S.D. Ohio Aug. 25, 2015) (dismissing charge that owner of tax preparation business violated Section 7212(a) by directing subordinates to falsify client files in anticipation of routine IRS audits because the audits had not yet begun).

4. It is no answer to say (Pet. Br. 51-52) that the government should charge defendants in these circumstances with other offenses. The government need not forgo enforcement of Section 7212(a), under the terms Congress has expressly provided in the statute, simply because alternative offenses may be available. Forcing the government to break up an endeavor into its constituent parts and charge them as standalone offenses would also eliminate the usefulness of the provision in attacking the scheme as a whole and in ensuring appropriate punishment for those who devise an obstructive endeavor that aggregates a variety of lesser offenses and non-criminal acts. And in any event, the very act of obstruction may make it difficult, and perhaps impossible, to establish other offenses.

This case is a good example of those problems. As explained (p. 8, *supra*), petitioner's systematic destruction of documents and shuttling of assets prevented the government from proving beyond a reasonable doubt that he committed tax evasion, in violation of 26 U.S.C. 7201, because it could not establish his specific tax deficiency. See *Sansone* v. *United States*, 380 U.S. 343, 351 (1965) (noting that tax evasion requires the "existence of a tax deficiency"). If Section 7212(a) required proof of a known pending investigation or other proceeding, petitioner's successful efforts to thwart the computation of his income and tax liability could be prosecuted only as a misdemeanor such as failure to file under 26 U.S.C. 7203. And if petitioner's destruction of documents had resulted in an inability to determine even his gross income and resulting obligation to file a return, petitioner may have gone completely unprosecuted.

II. PETITIONER IDENTIFIES NO BASIS IN THE TEXT OR HISTORY OF SECTION 7212(a) FOR REQUIRING OBSTRUCTION OF A KNOWN, PENDING IRS INVESTIGATION OR ENFORCEMENT PROCEEDING

Petitioner identifies nothing in the ordinary meaning of Section 7212(a)'s omnibus clause that would support limiting it to obstruction of a known, pending IRS audit, investigation, or similar proceeding. Instead, he relies on an analogy to the general obstruction-of-justice statute (18 U.S.C. 1503), inapplicable principles of construction, and extracts from legislative history to argue that this Court should infer such an element despite its absence from the statutory text. This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face," *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (citation omitted), and petitioner

provides no sufficient reason to depart from that principle here.

A. The Phrase "Due Administration Of This Title" In Section 7212(a) Is Not Equivalent To The Phrase "Due Administration Of Justice" In Section 1503(a)

1. Petitioner contends (Br. 23-28) that the phrase "due administration of this title" in Section 7212(a) is a term of art that should be construed to have the same essential meaning as the phrase "due administration of justice" in 18 U.S.C. 1503(a). That statute applies to any person who "corruptly or by threats or force * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." *Ibid.* Because Section 1503(a) has been interpreted to require knowledge of a pending judicial proceeding, see *Aguilar*, 515 U.S. at 599, petitioner contends that the phrase "due administration of this title" in Section 7212(a) should be interpreted to require knowledge of a pending agency proceeding.

As the court of appeals explained (Pet. App. 23a-26a), petitioner's analogy to Section 1503(a) is flawed. Sections 1503(a) and 7212(a) refer to different kinds of due administration: "of justice" and "of this title." Although petitioner repeatedly conflates the two, referring to them as simply the "due administration" provisions, *e.g.*, Br. 23, 26, 27, they are not the same. The administration of "justice" presupposes the existence of a pending judicial proceeding because that is how justice is usually administered in the United States: through discrete proceedings involving parties to an actual case or controversy requiring resolution by the courts. See *Black's Law Dictionary* 53 (10th ed. 2014) (defining "due administration of justice" as "[t]he proper functioning and integrity of a court or other tribunal and the

proceedings before it in accordance with the rights guaranteed to the parties").

Because the administration of justice in a court is a discrete event, knowledge of such a proceeding helps ensure that obstructive conduct is accompanied by culpable intent. See *Pettibone* v. *United States*, 148 U.S. 197, 206 (1893) ("[A] person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."); see also *Aguilar*, 515 U.S. at 599 (same, and noting that "the act must have a relationship in time, causation, or logic with the judicial proceedings"). *Aguilar* and *Pettibone* make clear that Section 1503(a)'s reference to obstructing "justice" is what supports a known-pending-proceeding requirement in that statute; neither case suggests that such a requirement is implicit in the phrase "due administration." See Pet. App. 28a n.10.

Section 7212(a), in contrast, refers to the due administration of "this title," *i.e.*, the Internal Revenue Code. 26 U.S.C. 7212(a). As explained (pp. 15-17, *supra*), the IRS duly administers the Code in a variety of ways that do not involve a pending audit, investigation, or other proceeding. Requiring knowledge of administration in only those forms is neither logical nor necessary. Unlike the due administration of justice, the due administration of the tax laws occurs on a regular and predictable schedule that is foreseeable to every taxpayer. And the statute's *mens rea* requirements limit its application to those who are aware of the forthcoming administration of the tax code, intend to obstruct that administration, and specifically intend to obtain an unlawful advantage as a result. See pp. 18-21, *supra*.

2. The history of Section 1503(a) further demonstrates why petitioner's analogy to that statute is unsound. As originally enacted, the statute that became Section 1503(a) provided that:

> Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer *in any court of the United States*, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, *the due administration of justice therein*, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both.

Rev. Stat. § 5399 (1878) (emphases added). The language of that statute thus provided that obstruction was a crime only when it was directed at "the due administration of justice" in a "court of the United States." See *Pettibone*, 148 U.S. at 202, 207 (noting that "the due administration of justice therein" meant "obstruction of the due administration of justice in any court of the United States").

In 1909, Congress amended Rev. Stat. § 5399 to include endeavors to influence or impede grand and petit jurors and witnesses in proceedings before United States commissioners. See Act of Mar. 4, 1909, ch. 321, § 135, 35 Stat. 1113. Congress retained the prohibition on obstructing the "due administration of justice therein" that existed in the earlier statute. *Ibid.*; see *Russell*, 255 U.S. at 140. In 1948, Congress moved that provision to 18 U.S.C. 1503 and made minor wording changes as part of the general recodification of the federal criminal code, including by deleting the word "therein" after "due administration of justice." See Act of June 25, 1948, ch. 645, § 1503, 62 Stat. 769-770. As

petitioner concedes (Br. 26 n.2), that "[m]inor change[] * * * in phraseology" was not intended to alter the meaning of the statute. H.R. Rep. No. 304, 80th Cong., 1st Sess. 107 (1947); see *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (noting that changes to the wording of criminal provisions as part of the 1948 recodification presumptively "worked [no] change in the underlying substantive law") (citation omitted).

As this Court recognized in *Aguilar*, the requirement of a known, pending judicial proceeding that existed under Rev. Stat. § 5399 and *Pettibone* was carried through to Section 1503(a). See *Aguilar*, 515 U.S. at 599 ("[A]s in *Pettibone*, if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."). Section 7212(a) has no similar lineage connecting the phrase "due administration of this title" to a pending IRS proceeding. No reason exists to conclude that Congress intended *sub silentio* that the phrase "due administration of this title" in Section 7212(a) would inherently contain the pending-proceeding requirement that Congress had specifically attached to the phrase "due administration *of justice*" in Section 1503(a) and its predecessors.

3. Indeed, had Congress wanted to incorporate a pending-proceeding requirement in Section 7212(a), it had a much better blueprint at hand than Section 1503. Section 1505 of Title 18 makes it a crime to:

> corruptly, or by threats or force, * * * influence[], obstruct[], or impede[] or endeavor[] to influence, obstruct, or impede the due and proper administration of the law under which *any pending proceeding is being had before any department or agency of the United States*.

18 U.S.C. 1505 (emphasis added).[3] Congress enacted that statute for the express purpose of "extend[ing] the protection" afforded to judicial proceedings under the obstruction-of-justice statute to "proceedings before administrative agencies of the Government." H.R. Rep. No. 1143, 76th Cong., 1st Sess. 1 (1939). The fact that Congress "included an express [pending-proceeding] requirement" in Section 1505 "clearly demonstrat[es] that it knows how to impose such a requirement when it wishes to do so." *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005). Its decision not to do so in Section 7212(a), attending instead to obstruction of the "due administration" of the Internal Revenue Code in all its forms, "speaks volumes." *United States* v. *Shabani*, 513 U.S. 10, 14 (1994).

B. Petitioner's Other Statutory Construction Arguments Lack Merit

Petitioner argues (Br. 28-33) that two principles of statutory construction—*noscitur a sociis* ("a word is known by the company it keeps") and the rule against superfluity—further support limiting the phrase "due administration of this title" to pending IRS audits, investigations, and similar proceedings of which the defendant is aware. Neither supports petitioner's atextual reading of the statute.

1. Section 7212(a) "contains two distinct clauses, which each describe a separate offense." *United States* v. *Pansier*, 576 F.3d 726, 734 (7th Cir. 2009). The first

---

[3] As originally enacted, the statute referred to "the due and proper administration of the law under which [a] proceeding is being had before [a] department, independent establishment, board, commission, or other agency of the United States." Act of Jan. 13, 1940, ch. 1, § 135(a), 54 Stat. 13.

clause applies to whoever "corruptly or by force or threats of force * * * endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title." 26 U.S.C. 7212(a). The second clause (the omnibus provision at issue here) applies to whoever "in any other way corruptly or by force or threats of force * * * obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title." *Ibid.* Petitioner contends (Br. 29-30) that the first clause requires proof of "direct" interference with known IRS agents engaged in their lawful duties, and thus the principle of *noscitur a sociis* dictates that the omnibus clause should require "direct" interference with IRS audits, investigations, or similar proceedings.

Petitioner's contention is wrong for several reasons. First, the first clause of Section 7212(a) does not forbid interfering with IRS employees only while they are conducting audits, investigations, or other proceedings. The text equally applies while they are gathering information or calculating, assessing, or collecting taxes. Petitioner does not appear to argue otherwise. *E.g.*, Br. 29. Adopting a parallel construction of the first and second clauses (which share the same *mens rea* requirement) would thus reinforce the conclusion that the phrase "due administration of this title" includes not only investigations and other proceedings, but the antecedent stages of the tax code's administration.

Second, petitioner fails to identify any foundation for his apparent belief that a person who hides income, diverts corporate assets to personal accounts, and destroys or disposes of business tax records essential to the reporting, calculation, and assessment of taxes—all with the specific intent to obstruct the IRS's ability to

administer the Internal Revenue Code and to gain an unlawful advantage—has not "directly" obstructed the due administration of the Code. Nor does he identify a textual basis for his evident assumption that doing those things *vis-à-vis* a particular IRS employee would not count as "corruptly * * * imped[ing]" that employee in the discharge of her lawful duties. 26 U.S.C. 7212(a).

Third, and in any event, petitioner's reliance on the principle of *noscitur a sociis* is misplaced. That principle is used only to construe terms that are "of obscure or doubtful meaning," not to change the meaning of unambiguous terms that are simply broad. *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 520 (1923). Moreover, the principle may only be "invoked when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning." *S. D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (citation omitted); see *Beecham* v. *United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). The first and second clauses of Section 7212(a) are not items in a list of related terms; rather, they are distinct offenses phrased in the disjunctive. 26 U.S.C. 7212(a). That structure simply does not lend itself to application of *noscitur a sociis*.

In *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008), for example, this Court noted that the principles of *noscitur a sociis* and its close relative, *ejusdem generis*, may be useful in interpreting "a list of specific items separated by commas and followed by a general or collective term," or a generic term that is "closely surrounded" by more "specific references." *Id.* at 225-

226. But they have little use, the Court held, in interpreting distinct statutory provisions, particularly those phrased in the "disjunctive, with one specific and one general category." *Id.* at 225; see, *e.g.*, *S. D. Warren Co.*, 547 U.S. at 379 (rejecting argument that, under *noscitur a sociis*, "pairing a broad statutory term with a narrow one shrinks the broad one"); *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941) (concluding that *ejusdem generis* "gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards").[4]

The fact that Section 7212(a) has the same "two-part structure" as Section 1503(a), Pet. Br. 24, does not support petitioner's argument. Rather, it demonstrates the argument's flaw. This Court noted in *Aguilar* that Section 1503(a) identifies specific obstruction offenses against individuals followed by a separate "[o]mnibus" and "catchall" provision that is "far more general in scope than the earlier clauses of the statute." 515 U.S. at 598. Justice Scalia explained in a separate opinion that, because of this structure, "the omnibus clause is *not* a general or collective term following a list of specific items to which a particular statutory command is applicable," but rather is "one of the several distinct and independent prohibitions contained in § 1503," and thus

---

[4] The cases petitioner cites (Br. 31-33) in which this Court has applied the principle of *noscitur a sociis* are quite different, and instructive in comparison. See *McDonnell* v. *United States*, 136 S. Ct. 2355, 2369 (2016) (applying *noscitur a sociis* to a list of six nouns within the definition of an "official act"); *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015) (plurality opinion) (noting that the term "tangible object" in 18 U.S.C. 1519 "is the last in a list of terms" that otherwise included records and documents).

is not subject to analysis under *ejusdem generis* and related principles. *Id.* at 615 (Scalia, J., concurring in part and dissenting in part); see *Ali*, 552 U.S. at 225 (citing that portion of Justice Scalia's opinion in *Aguilar* as authoritative). The same is true of Section 7212(a).

But even if *noscitur a sociis*, *ejusdem generis*, or related principles applied in this circumstance, they would not yield the result petitioner seeks. The "common attribute" shared by the first and second clauses of Section 7212(a), *Ali*, 552 U.S. at 225, is a prohibition on acts that, with the requisite *mens rea*, interfere with the ability of the IRS and its employees to discharge their official responsibilities to administer the tax code. Neither clause is limited to known, pending IRS audits, investigations, and other such proceedings. The first clause therefore provides no textual basis for importing such a limitation into the second clause.

2. Petitioner further contends (Br. 31) that unless Section 7212(a)'s omnibus clause is limited to the obstruction of known, pending IRS audits, investigations, and similar proceedings, it would render the statute's first clause superfluous. But "the whole value of a generally phrased residual clause * * * is that it serves as a catchall" to ensure that the full range of conduct Congress sought to regulate comes within the statute, including "matters not specifically contemplated" by more specific provisions. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 860 (2009). And that is plainly what Congress did here: it made it a crime to interfere with particular IRS employees "*or in any other way*" to obstruct or impede the due administration of the tax code. 26 U.S.C. 7212(a) (emphasis added). Congress frequently uses

similar language to identify catchall statutory provisions.[5] "Redundancies across statutes are not unusual events in drafting," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992), and hardly present the sort of "clear statutory command[s]" necessary to "override ordinary meaning," *Lopez* v. *Gonzales*, 549 U.S. 47, 55 n.6 (2006).

C. The Legislative History Of Section 7212(a) Provides No Support For Petitioner's Reading Of The Statute

Because "the statutory language provides a clear answer," the construction of Section 7212(a) "ends there" and resort to legislative history is unnecessary. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999); see *Chamber of Commerce* v. *Whiting*, 563 U.S. 582, 599 (2011) ("Congress's authoritative statement is the statutory text, not the legislative history.") (citation omitted). Regardless, the legislative history of Section 7212(a) provides no support for petitioner's atextual construction of the statute.

Section 7212 was enacted as part of the Internal Revenue Code of 1954. See ch. 736, § 7212, 68A Stat. 855. As courts have repeatedly noted, the accompanying

---

[5] See, *e.g.*, 18 U.S.C. 335 (making it a crime to "knowingly issue[], reissue[], or utter[] as money, *or in any other way* knowingly put[] in circulation" bills, notes, and securities on behalf of certain corporations); 16 U.S.C. 973c(b)(5) (making it illegal "to operate a vessel in such a way as to disrupt *or in any other way* adversely affect" local fisheries); 21 U.S.C. 467b(a)(1) (authorizing the government to seize poultry that has been "distributed or offered or received for distribution in violation of this chapter" or that "*in any other way* is in violation of this chapter"); 49 U.S.C. 20109(a) (providing that railroad carriers "may not discharge, demote, suspend, reprimand, *or in any other way* discriminate against" certain whistleblowers) (all emphases added).

House and Senate reports contain no substantive discussion of the statute's omnibus clause. See, *e.g.*, *Mitchell*, 985 F.2d at 1279 ("We do not find the history particularly enlightening or dispositive as to Congress's understanding of the precise scope of the omnibus provision."); *United States* v. *Williams*, 644 F.2d 696, 699 n.13 (8th Cir.) (noting that the "scant legislative history" for Section 7212 is "silent on [the] omnibus clause" and thus "virtually useless" in interpreting that provision), cert. denied, 454 U.S. 841 (1981).

Instead, the reports focus on the first clause of Section 7212(a). See H.R. Rep. No. 1337, 83d Cong., 2d Sess. 108 (1954) (House Report); S. Rep. No. 1622, 83d Cong., 2d Sess. 147 (1954) (Senate Report). The statute's omnibus clause is mentioned in passing only twice in each of the reports, both times to clarify that acts of force or threats coming within the first clause would also come within the second clause. See House Report 108 (noting "cases where the officer is intimidated or injured; that is, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws"); *id.* at A426 (referring to attempts "by force or threat of force * * * to obstruct or impede the due administration of this title"); Senate Report 147, 604 (same).

The reports' focus on force and threats against IRS employees is unsurprising, given that prior law was limited to assaults against revenue agents and the scope of protection against threats was the subject of debate. See House Report A426-A427; Senate Report 148, 604. Nothing in the legislative history, however, purports to interpret the omnibus clause or "limit th[e] broad language" of that provision—much less limit it to pending

IRS audits, investigations, and other proceedings (which are not mentioned *anywhere* in the legislative history). *United States* v. *Martin*, 747 F.2d 1404, 1409 (11th Cir. 1984). "Congress was not required to list in the legislative history every conceivable corrupt endeavor to avoid waiving the statute's application to one type of corrupt endeavor." *Ibid.*; see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). The "inconclusive statutory history" of Section 7212(a) provides no "basis for refusing to give effect to [the statute's] plain language." *Hubbard* v. *United States*, 514 U.S. 695, 708 (1995).

D. The Rule Of Lenity Does Not Apply

Petitioner argues (Br. 56-58) that, if all else fails, this Court should adopt his interpretation of Section 7212(a) under the rule of lenity. That rule "applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended." *Ocasio* v. *United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (citation omitted); see *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (noting that the Court has "declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government"). As explained, petitioner's reading of Section 7212(a) is inconsistent with the ordinary meaning of the statutory text, and nothing in the statute's structure or history overcomes that meaning. The rule of lenity does not apply.

III. PETITIONER'S POLICY ARGUMENTS DO NOT SUPPORT HIS INTERPRETATION OF SECTION 7212(a)

Petitioner contends (Br. 40-56) that the government's interpretation of Section 7212(a) is too expansive; that it overlaps with other criminal offenses the government should charge instead; and that it could chill "legitimate tax minimization activity." None of those assertions is a reason to adopt petitioner's atextual reading of the statute. See *Lewis* v. *City of Chicago*, 560 U.S. 205, 217 (2010) ("[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted."). Regardless, petitioner's claims lack merit.

A. Section 7212(a) Does Not Impermissibly Overlap With Other Criminal Statutes

Petitioner asserts (Br. 40-52) that giving Section 7212(a)'s omnibus clause its ordinary meaning would upset the balance of the Internal Revenue Code's criminal provisions by creating too much overlap with other misdemeanor and felony offenses. This Court has consistently explained, however, that overlap in the scope or even the precise elements of criminal statutes is commonplace, especially in the tax code, and does not warrant limiting the scope of Congress's enactments or forcing the government to prosecute only the less serious offense. Petitioner's arguments to the contrary are especially misplaced in the context of Section 7212(a), which has different elements than other tax offenses.

1. This Court has long recognized that overlap, even "substantial" overlap, "is not uncommon in criminal statutes." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 n.4 (2014). "[W]hen an act violates more than one

criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979); see, *e.g.*, *Rosenberg* v. *United States*, 346 U.S. 273, 294 (1953) (Clark, J., concurring, joined by five members of the Court) ("Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law."); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952). That principle applies whether the overlap involves "two statutes with different elements" or "two statutes with identical elements." *Batchelder*, 442 U.S. at 125. The fact that statutes have different maximum penalties is generally irrelevant, *id.* at 124-125, as is the classification of those offenses as felonies or misdemeanors, see, *e.g.*, *Bishop*, 412 U.S. at 361; *Sansone*, 380 U.S. at 352; *Berra* v. *United States*, 351 U.S. 131, 134 (1956).

The tax code's criminal provisions provide an "obvious" example of such overlap. *Sansone*, 380 U.S. at 349. This Court has repeatedly considered, and rejected, claims that criminal tax statutes are improperly duplicative, including claims that conduct charged as a felony should instead have been charged as a misdemeanor. In *Spies*, for example, this Court held that a jury could properly convict the defendant of felony tax evasion if it found that his conduct, which included willfully failing to file a return and pay a tax (both misdemeanors), also showed an "affirmative willful attempt" to evade tax liability. 317 U.S. at 499-500. The Court expressed skepticism that Congress would intend to criminalize "*no more than* the same derelictions" in a felony provision than in a misdemeanor provision, *id.* at 497 (emphasis added), but held that the additional requirement of an

affirmative attempt in the felony provision resolved any concern—even though the same facts could be used to prove both offenses. *Id.* at 498-499.

This Court has repeatedly reaffirmed the principle that overlap between the tax code's misdemeanor and felony provisions—even *exact* overlap on the facts of a case—presents no impediment to a felony conviction. In *Sansone*, for example, the Court held that the government was permitted to charge felony tax evasion under 26 U.S.C. 7201 based solely on facts that "covered precisely the same ground" as two misdemeanor provisions (failure to pay a tax under 26 U.S.C. 7203 and filing a false document under 26 U.S.C. 7207). 380 U.S. at 352-353 (quoting *Berra*, 351 U.S. at 134). In *Bishop*, the Court extended that holding to a felony conviction under 26 U.S.C. 7206(1) (filing a false tax return) that was based on conduct also covered by Section 7207. See 412 U.S. at 361 (affirming felony conviction even though, on the facts of the case, "a conviction of the misdemeanor would clearly support a conviction for the felony," and rejecting request for a lesser-included-offense instruction); see also, *e.g.*, *Berra*, 351 U.S. at 134-135 (affirming conviction for felony tax evasion based on facts that "were identical with those required to prove" a misdemeanor and rejecting lesser-included-offense instruction on the misdemeanor); *United States* v. *Noveck*, 273 U.S. 202, 207 (1927) (noting that factual overlap between felony and misdemeanor provisions in the tax code is "no obstacle" to enforcing both).[6]

---

[6] In the Tax Reform Act of 1984, Pub. L. No. 98-369, Div. A, § 159(a), 98 Stat. 696, Congress overturned a lower court's determination that conduct violating one of the tax code's misdemeanor provisions could not also be prosecuted as a felony. See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1001 (1984) (noting that a provision of

The same principle applies to comparisons between two felony provisions. In *Beacon Brass Co.*, this Court affirmed the defendant's conviction for tax evasion based on false statements made to the Treasury Department, even though those statements could also have been prosecuted under another statute prohibiting false statements made to government agencies. 344 U.S. at 46. The Court found no support for the notion that the existence of a statute "specifically outlawing * * * false statements" meant that tax evasion committed by means of a false statement could not be punished under the tax code. *Ibid.* And in *Batchelder*, when confronted with two statutes prohibiting the same offense of possession of a firearm by a convicted felon (one of which allowed a higher possible term of imprisonment), the Court held that the government was free to pick which one it wanted to enforce. 442 U.S. at 123-125.

2. These principles demonstrate why petitioner's complaints about potential overlap between the government's interpretation of Section 7212(a) and other tax offenses are misplaced.

a. Consider first the tax code's misdemeanor provisions. Each of the offenses petitioner cites makes it a crime to "willfully" do (or fail to do) certain things in violation of the tax laws. See 26 U.S.C. 7203 (willful failure to pay tax, file a return, keep records, or supply information), 7205 (willfully providing false information, or failing to provide information, to employer), 7207 (willfully making a material false statement). The willfulness element in each of those statutes requires the

---

the Act was intended to overrule an Eighth Circuit decision that prevented "prosecution for willful evasion [26 U.S.C. 7201] * * * where prosecution for a false certificate [26 U.S.C. 7205] [was] also possible").

government to prove that the defendant was aware that her conduct was illegal under the tax laws. See, *e.g.*, *Cheek*, 498 U.S. at 201; *Bishop*, 412 U.S. at 356, 360.

Those provisions may be violated in a variety of circumstances that would not be felonies under Section 7212(a). A defendant may, for example, fail to provide information, keep records, or pay her taxes due to "[w]illful but passive neglect." *Spies*, 317 U.S. at 499. She may make false statements out of "embarrassment, fear, or a desire for privacy," despite knowing that her actions are unlawful. *Kungys* v. *United States*, 485 U.S. 759, 780 (1988) (citation omitted). Or she may simply be a "disgruntled taxpayer" seeking to "annoy" the IRS "with no intent to gain any advantage or benefit other than the satisfaction" of causing annoyance. *Reeves*, 752 F.2d at 999; see *id.* at 1002 (Gee, J., concurring) (noting that some willful violations of the tax code "arise from simple contrariness"). Each of those circumstances would be punishable as misdemeanors, but none necessarily involves a corrupt endeavor to intentionally obstruct the IRS's ability to administer the tax code with the specific intent to gain an unlawful advantage, which would be necessary to prove felony obstruction.

Petitioner makes three principal arguments in response, none of which is persuasive. First, he contends (Br. 43-47, 52-53) that the *mens rea* requirement of Section 7212(a) will be satisfied in "almost" all cases that could be prosecuted as misdemeanors. The examples cited above show that he is wrong about that. But even if he were right, the fact that two statutes may commonly be applied to the same recurring set of facts is not a license to ignore their separate elements. See, *e.g.*, *Bishop*, 412 U.S. at 357-358 (rejecting argument that the presence of perjury declarations in all federal

tax returns "effectively equalize[d]" the felony perjury statute and the misdemeanor false statement statute); cf. *United States* v. *Wells*, 519 U.S. 482, 491 n.9 (1997) (in determining whether false statements must be material under 18 U.S.C. 1014, "[t]he question is not whether the specified categories of statements will almost certainly be material statements in point of fact," but rather "whether materiality must be proven as a separate element"). And regardless, this Court has explained that even "two statutes with *identical* elements" create no impermissible overlap. *Batchelder*, 442 U.S. at 125 (emphasis added).

Second, petitioner notes (Br. 43-44) that the requirement of intent to obtain an unlawful advantage need not involve a particular *financial* advantage under the tax laws. That observation, though true, does not mean that any advantage will suffice. The "advantage" required by Section 7212(a) must be illegal and must arise directly from the defendant's obstructive acts. Unlawfully reducing or eliminating one's tax liability is an obvious example. See *Reeves*, 752 F.2d at 998. Others may include filing fraudulent tax returns to intimidate judges and other public officials, see *United States* v. *Saldana*, 427 F.3d 298, 301-302 (5th Cir.), cert. denied, 546 U.S. 1067 (2005), and 546 U.S. 1122 (2006); and concealing the fact that reported income is actually laundered drug proceeds, see *Popkin*, 943 F.2d at 1536-1537. Maintaining one's privacy, avoiding the tedium of filling out tax forms, or feeling good about having annoyed the IRS does not suffice. See, *e.g.*, *Spies*, 317 U.S. at 499; *Reeves*, 752 F.2d at 999.

Third, petitioner argues (Br. 44-45) that enforcing Section 7212(a) in circumstances where a misdemeanor

charge might also be brought gives the government unfair leverage over the defendant's punishment. This Court has repeatedly rejected that assertion. "The lack of minimum penalties" in the tax code's criminal provisions "denies to the prosecutor an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor." *Sansone*, 380 U.S. at 350 n.6. Although a prosecutor may appropriately take "the penalties available upon conviction" into account when making charging decisions, that choice merely affects the range the court will ultimately consider when exercising its sentencing discretion. *Batchelder*, 442 U.S. at 125; see *ibid.* ("Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.").

b. Petitioner's assertion (Br. 49-51) that the government's interpretation of Section 7212(a) will impermissibly overlap with, or permit the government to circumvent the requirements of, other felony provisions fails for the same reasons. Petitioner focuses on two crimes—tax evasion under 26 U.S.C. 7201 and filing a false tax return under 26 U.S.C. 7206(1)—but neither supports his argument. Section 7201 allows a higher maximum punishment (five years of imprisonment) than Section 7212(a) and requires proof of different elements, including the "existence of a tax deficiency" and a willful effort to evade that deficiency. *Sansone*, 380 U.S. at 351. Section 7206(1), which carries the same maximum punishment as Section 7212(a), also requires proof of different elements. See 26 U.S.C. 7206(1) (requiring the defendant to willfully make and subscribe a

return or other document "under the penalties of perjury" that he knows contains a material false statement).[7]

Petitioner's efforts to portray the criminal provisions of the tax code as neat, hermetically sealed statutes—and his colorful allusions to Section 7212(a) as an "all-purpose tax crime" (Br. 3, 52) and a "back-pocket secret weapon" (Br. 49)—collapse in the face of reality. Criminal tax provisions have much in common with each other and with other criminal statutes, reflecting Congress's desire to provide comprehensive and overlapping protections against those who seek to evade their duties under our self-reporting system of taxation and to obstruct the IRS in the discharge of its responsibilities to administer the tax code. Section 7212(a) is a specific and limited provision that serves an important role alongside other criminal statutes in specifically protecting the processes the IRS uses to administer the tax laws.

B. Section 7212(a) Does Not Impermissibly "Chill" Lawful Conduct

Petitioner (Br. 54-55) and several of his supporting *amici* contend that a straightforward reading of Section 7212(a) will impermissibly "chill" lawful conduct. That assertion is unfounded.

---

[7] Petitioner also briefly mentions (Br. 47) 26 U.S.C. 7212(b), which makes it a felony to "forcibly rescue[]" property seized by the IRS. That statute complements Section 7212(a) by providing for a reduced sentence (up to two years of imprisonment) if the government proves that the defendant knew property was seized by the IRS and sought to recover it by force, without the need to prove obstructive intent. See *United States* v. *Hardaway*, 731 F.2d 1138, 1140 (5th Cir.), cert. denied, 469 U.S. 865 (1984).

Petitioner notes (Br. 5, 39), for example, that obstructive acts may consist of "otherwise lawful conduct." But most obstruction statutes (and many other criminal statutes) reach conduct that would be innocent but for a culpable mental state. Shredding documents or deleting computer files is not inherently wrongful conduct, but it *becomes* wrongful if done with the requisite criminal intent. See *Yates* v. *United States*, 135 S. Ct. 1074, 1085-1086 (2015) (plurality opinion) (citing 18 U.S.C. 1519). The same is true of persuading a person not to go to court, *Arthur Andersen*, 544 U.S. at 703-704, or a public official's expressions of support for a course of action, *McDonnell* v. *United States*, 136 S. Ct. 2355, 2371 (2016). Culpable *mens rea* requirements, reinforced by "the constitutional safeguard of proof beyond a reasonable doubt," *In re Winship*, 397 U.S. 358, 368 (1970), amply distinguish the person who innocently shreds documents while cleaning out her office from the criminal who does so as part of a corrupt endeavor to obstruct the IRS's ability to ascertain her income and calculate, assess, and collect any taxes she may owe.

Similarly, the government's interpretation of Section 7212(a) will not impermissibly chill "legitimate tax minimization activity." Pet. Br. 54. "Taxpayers are * * * generally free to structure their business affairs as they consider to be in their best interests, including lawful structuring * * * to minimize taxes." *Commissioner* v. *First Sec. Bank of Utah*, 405 U.S. 394, 398 n.4 (1972). Neither petitioner nor any of his supporting *amici* identify a single example of a lawful tax-minimization strategy that has actually been placed at risk by the federal courts' widespread adoption of the interpretation of Section 7212(a) that the government advocates here. See p. 9, *supra* (citing cases). To the extent they fear

scrutiny of tax-avoidance schemes that operate in a gray area of dubious legality, that possibility already exists under many criminal tax provisions, not just Section 7212(a). The heightened *mens rea* requirements of Section 7212(a) and other tax offenses protect taxpayers and their advisors who make reasonable but mistaken judgments about what the tax code allows. See *Cheek*, 498 U.S. at 199-200; *Bishop*, 412 U.S. at 360-361. No reason exists to further limit the scope of Section 7212(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
DAVID A. HUBBERT
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROBERT A. PARKER
Assistant to the Solicitor General
S. ROBERT LYONS
STANLEY J. OKULA, JR.
GREGORY VICTOR DAVIS
GREGORY S. KNAPP
Attorneys

OCTOBER 2017

APPENDIX

1. 18 U.S.C. 1503 provides:

Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

2. 18 U.S.C. 1505 provides in pertinent part:

Obstruction of proceedings before departments, agencies, and committees

* * * * *

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

3. 18 U.S.C. 1515(b) provides:

Definitions for certain provisions; general provision

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

4. 26 U.S.C. 7212 provides:

Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

(b) Forcible rescue of seized property

Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.

No. 16-1144

IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

JOSEPH M. LATONA
403 Main Street
716 Brisbane Building
Buffalo, NY 14203

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
DAVID BITKOWER
MICHAEL E. STEWART
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REPLY ARGUMENT 3

I. The Text, Structure, History, And Purpose Of § 7212(a) Confirm That It Has A Pending Proceeding Requirement 3

A. Section 7212(a)'s "Due Administration" Clause Concerns Obstruction Of Pending Proceedings 3

B. The Government's Interpretation Cannot Be Reconciled With The Rest Of § 7212(a) 8

C. Section 7212(a)'s Legislative History Supports A Pending Proceeding Requirement 11

D. The Government's "Purpose" Arguments Are Unavailing 11

II. The Government's Interpretation Cannot Be Reconciled With The Code's Substantive Offenses 13

A. The Government's Interpretation Creates Glaring Incongruities 14

B. Section 7212(a) Should Be Construed To Avoid Those Glaring Incongruities 18

III. The Government's Interpretation Reaches Conduct Congress Never Intended To Criminalize And Poses A Grave Danger of Prosecutorial Abuse 21

IV. To The Extent The Court Finds § 7212(a) Ambiguous, The Rule Of Lenity Warrants Reversal 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Achilli v. United States, 353 U.S. 373 (1957) 14, 19

Arthur Andersen LLP v. United States 544 U.S. 696 (2005) 23

Berra v. United States, 351 U.S. 131 (1956) 20

Cheek v. United States, 498 U.S. 192 (1991) 15

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 10

Cleveland v. United States, 531 U.S. 12 (2000) 24

Helvering v. Gregory, 69 F.2d 809 (2d Cir. 1934) 23

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) 4

Loughrin v. United States, 134 S. Ct. 2384 (2014) 8, 21

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) 18

Marx v. General Revenue Corp., 568 U.S. 371 (2013) 18

McDonnell v. United States, 136 S. Ct. 2355 (2016) 8, 10

Sansone v. United States, 380 U.S. 343 (1965) 20

Spies v. United States, 317 U.S. 492 (1943) ... 16, 17, 19

United States v. Aguilar, 515 U.S. 593 (1995) 4, 5, 7, 23

United States v. Batchelder, 442 U.S. 114 (1979) 21

United States v. Bishop, 412 U.S. 346 (1973) 20

United States v. Crim, 451 F. App'x 196 (3d Cir. 2011) 12-13

United States v. Hall, --- F. Supp. 3d ---, No. 16-20839, 2017 WL 3412152 (E.D. Mich. Aug. 9, 2017) 5

United States v. Hardaway, 731 F.2d 1138 (5th Cir. 1984) 16

United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) 18

United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998) 4

United States v. Lovern, 293 F.3d 695 (4th Cir. 2002) 10

United States v. Madoch, 108 F.3d 761 (7th Cir. 1997) 13

United States v. Mitchell, 985 F.2d 1275 (4th Cir. 1993) 13

United States v. Sorensen, 801 F.3d 1217 (10th Cir. 2015) 13

United States v. Westbrooks, 858 F.3d 317 (5th Cir. 2017) 13

United States v. Williamson, 746 F.3d 987 (10th Cir. 2014) 14

Whitman v. American Trucking Associations, 531 U.S. 457 (2001) 11

STATUTES

18 U.S.C. § 1503 3
18 U.S.C. § 1505 8
26 U.S.C. § 5178 5
26 U.S.C. § 5841 5
26 U.S.C. § 9004 5
26 U.S.C. § 7203 ..... 7, 15
26 U.S.C. § 7207 7
26 U.S.C. § 7212(b) 14

OTHER AUTHORITIES

Department of Justice, *Criminal Resource Manual* (1997) 9

Department of Justice, *Criminal Tax Manual* (2012) 13, 16

Department of Treasury, *Internal Revenue Service Data Book, 2016*, I.R.S. Publ'n 55B (2017), https://www.irs.gov/pub/irs-soi/16databk.pdf 6

Jury Verdict, *United States v. Ogbazion*, No. 15-cr-104 (S.D. Ohio June 6, 2016), D.E. 173 12

Antonin Scalia & Bryan A. Garner, *Reading Law* (2012) 18

Webster's Third New International Dictionary (1993) 5

INTRODUCTION

The government spends much of its response brief contending that tax misconduct that occurs before an IRS proceeding is initiated should be punished. But this case is not about whether such misconduct can be punished (it can, civilly and criminally); it is about whether 26 U.S.C. § 7212(a) punishes the *distinct* crime of obstructing a pending IRS proceeding. Marinello's opening brief explained that by turning § 7212(a) into an all-purpose tax crime, the government's interpretation ignores the statute's text and history, makes a felony out of the very omissions that Congress simultaneously specified would warrant a misdemeanor, and sweeps in an enormous amount of legitimate conduct that taxpayers engage in every day.

The government's response largely does not challenge any of this. It concedes that the "due administration" language that Congress imported from a sister obstruction statute was limited to pending proceedings but tells the Court that the language should be given a far broader interpretation in the tax context. It contends that it does not matter if § 7212(a) subsumes the core crimes Congress enacted alongside it. And its response to the mammoth reach it asks this Court to give to § 7212(a) is "trust us."

None of that is correct. When Congress enacted § 7212(a) as part of the criminal tax code in 1954, it created a unified and coherent set of prohibitions and penalties. Those who fail to keep required records or file timely returns, submit false statements or documents, or attempt to evade taxes due and owing can be prosecuted regardless of whether the IRS has begun enforcement

proceedings. Section 7212(a), like the statute it was modeled on, penalizes those who obstruct IRS enforcement proceedings, conduct that is separately culpable from any pre-proceeding misconduct. The government fails to identify a single case in more than 60 years where § 7212(a) was necessary to prosecute pre-proceeding misconduct. By contrast, as Marinello and the *amici* from business, tax expert, and defense organizations have explained, the government is increasingly using its elastic interpretation of the statute to bypass the specific crimes and penalties that Congress has authorized.

The government dismisses in a footnote, Gov't Br. at 33 n.4., this Court's long line of cases serving as reminders that criminal provisions—including obstruction provisions—are not chained to maximalist interpretations, particularly when they read out neighboring provisions or sweep in conduct that Congress did not clearly intend to criminalize. As in cases like *McDonnell* and *Arthur Andersen*, this Court should follow § 7212(a)'s text, history, and structure rather than adopt the government's atextual and disruptive approach. The decision below should be reversed.

REPLY ARGUMENT

I. The Text, Structure, History, And Purpose Of § 7212(a) Confirm That It Has A Pending Proceeding Requirement

A. Section 7212(a)'s "Due Administration" Clause Concerns Obstruction Of Pending Proceedings

When Congress revised the tax obstruction statute to include obstruction of the "due administration" of the tax code, it was not drafting in a vacuum. Section § 7212(a)'s language mirrors almost word-for-word the "due administration" prohibition in 18 U.S.C. § 1503. The government seems to concede that Congress in 1954 would have understood § 1503's prohibition to be limited to pending proceedings, and it does not dispute that Congress intentionally borrowed this language for § 7212(a).[1] Gov't Br. 28-29. No other conclusion is plausible given the many ways the two statutes mimic either other in form and function. Pet'r Br. 24 (cataloging shared phrases).

As this Court has held many times, where Congress borrows statutory language with a settled meaning, Congress is presumed to intend to adopt that meaning in

---

[1] The government emphasizes that § 1503's predecessor statute spelled out the connection to proceedings more clearly by using the word "therein." Gov't Br. 28. But as Marinello explained, Pet'r Br. 25 n.2, and the government concedes, Gov't Br. 28, § 1503's omission of "therein" did not change the pending proceeding requirement. Congress was entitled to use current language that carried a pending proceeding requirement (and that it had recently codified) rather than resurrect superseded language from § 1503's predecessor. Pet'r Br. 25 n.2.

the parallel statute. *E.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 589-90 (2010). None of the government's arguments for giving the same language a different meaning here is persuasive.

a. The starting point for the government's argument that Congress intended § 7212(a) to sweep more broadly than § 1503 is its question-begging premise that "justice" is administered in proceedings, while the tax code is not. Gov't Br. 27. But the administration of justice in the United States, read to its maximum breadth, could equally have been interpreted to encompass not just conduct taken in connection with pending judicial proceedings but a "wide array of activities including filing of false police reports, interfering with police investigations, or destroying evidence before a formal proceeding was underway." *United States v. Kassouf*, 144 F.3d 952, 956-57 (6th Cir. 1998).

Indeed, that was the very question this Court addressed in *Aguilar*, where the government argued that the defendant had obstructed the due administration of justice by making false statements to an FBI agent that "might or might not" affect a court proceeding. *United States v. Aguilar*, 515 U.S. 593, 600 (1995). This Court rejected that argument not because § 1503 was linguistically incapable of encompassing it, but because the Court was reluctant to presume that Congress meant to legislate so broadly as to reach every corrupt act regardless of its connection to a pending proceeding. Instead, both "deference to the prerogatives of Congress" and the need to give "fair

warning" warranted a narrower reading. *Id.* Those same considerations apply here in assessing whether Congress intended to penalize obstruction of IRS proceedings or the entire apparatus of the internal revenue system, which encompasses not just the assessment and collection of taxes, but a dizzying array of subjects including the regulation of distilled spirits plants, 26 U.S.C. § 5178, the registration of certain firearms, *id.* § 5841, and the certification of the eligibility of presidential candidates for matching funds, *id.* § 9004, among many others.

b. Moreover, the government's broader interpretation is hardly the more natural one because it treats as "obstruction" conduct that takes place long before any "due administration" does.

Congress used the verbs "obstructs" and "impedes" in connection with "administration" in § 7212(a). "Administration" means "an act of administering"; "obstruct" means to "block" or "hinder"; and "impede" means to "interfere with." *Webster's Third New Int'l Dictionary* 28, 1559, 1132 (1993). Both verbs thus imply some contact with an identifiable act of administering. It is perfectly natural to say that a taxpayer who makes false statements in connection with an audit "obstruct[s]" the "due administration" of the tax code because the taxpayer is interfering with a proceeding that is taking place with respect to him. *E.g.*, *United States v. Hall*, --- F. Supp. 3d ---, No. 16-20839, 2017 WL 3412152, at *2-4 (E.D. Mich. Aug. 9, 2017).

Conversely, it is awkward to say that a defendant "obstructs the due administration" of the tax code when any act of administering would take place, if ever,

months or years, after the purportedly obstructive conduct. For example, no one would naturally say that a taxpayer "impedes" the due administration of the code when it adopts a complex corporate structure when any assessment of that structure by the IRS would come years later. Nor would one ordinarily say, as the government does here, that it "impedes" the IRS's administration of the tax code not to provide "complete" information to an accountant who was not retained to prepare a tax return or otherwise communicate with the IRS. Similarly, a defendant who fails to pay his taxes or maintain necessary records ordinarily would be described as *violating* the tax laws, but not as "obstructing" their administration.

c. The government seeks to bridge the gap between everyday conduct and "an act of administering" by responding that the IRS acts so "regularly" and "predictably" that "every taxpayer can foresee the likely effect" that his supposedly obstructive actions will have on the administration of the tax code. Gov't Br at 10-11, 15. But the vast majority of pre-proceeding conduct—whether making a cash payment or not maintaining documents—will never be the subject of any administration by the IRS, must less affect the enforcement of the tax laws. *See, e.g.*, Dep't of Treasury, *Internal Revenue Service Data Book, 2016*, I.R.S. Publ'n 55B at 23 (2017) (approximately 0.6% of all returns audited in fiscal year 2016).[2] Indeed, that is precisely why Congress passed a series of *other* criminal statutes governing taxpayer behavior in advance of an

---

[2] *Available at* https://www.irs.gov/pub/irs-soi/16databk.pdf.

enforcement proceeding—requiring taxpayers to submit detailed returns, to do so at specified times, and to keep required back-up documentation, and penalizing fraudulent submissions. *See, e.g.*, 26 U.S.C. §§ 7203, 7207.

Conversely, a taxpayer *does* have knowledge that his actions will affect the administration of the tax laws when the government has given notice of an audit, issued a summons, or initiated some other enforcement proceeding. Those who engage in obstruction once on notice of an enforcement proceeding are guilty of a crime separate and apart from any substantive tax crime they may have engaged in beforehand.

d. Nor is it any answer to say, as the government does, Gov't Br. 17, that the statute reaches individuals who "endeavor" to obstruct. That same language is present in § 1503 and it captures unsuccessful attempts at the same type of "obstruction" otherwise covered by the statute. A taxpayer will thus still violate § 7212(a) if his attempt to obstruct a proceeding fails (*e.g.*, because his attempt to silence an employee in the course of an enforcement action is unsuccessful), but actions or omissions unconnected to an IRS proceeding are not obstruction. *Cf. Aguilar*, 515 U.S. at 602 (obstruction includes a "foiled" attempt to make a "subpoenaed witness" give false testimony).

2. Finally, the government argues, Gov't Br. 30 & n.3, that if Congress had wanted § 7212(a)'s due administration clause to be limited to obstruction of IRS proceedings, then it could have borrowed language from 18 U.S.C. § 1505, which punished obstruction of "the due and proper administration of the law under which any

pending proceeding is being had before any department." But Congress was free to use § 1503's (notably more concise) language that was equally understood to refer to pending proceedings and that also tracked the other prohibitions against impeding individual officers that Congress wished to adopt. What is more notable is that the government is arguing for an interpretation of obstruction that detaches it from any pending proceeding when neither § 1503 nor § 1505 does so.

B. The Government's Interpretation Cannot Be Reconciled With The Rest Of § 7212(a)

The flaws of the government's interpretation multiply in light of the first clause of § 7212(a), which prohibits the forcible or corrupt intimidation or impediment of IRS officers.

1. The "officers" clause was the focus of Congress's attention in enacting § 7212(a), Pet'r Br. 38-39, yet the government's interpretation makes that clause wholly superfluous. As the government acknowledges, without a pending proceeding requirement, every act or omission that corruptly or forcibly intimidates or impedes an IRS officer will likewise impede the administration of the tax code. Gov't Br. 34. The government's interpretation should be rejected on that ground alone. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (refusing to adopt construction that "would make § 1344's second clause a mere subset of its first"); *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (refusing to adopt a reading of "matter" whereby "the terms 'cause, suit, proceeding or controversy' would serve no role in the statute").

The government responds that statutes sometimes contain redundancies and that the value of a "catchall" provision is its breadth. Gov't Br. at 34-35. But the government's interpretation does not merely catch all of the ways (beyond corruption, force, or threats of force) that a taxpayer might obstruct an IRS agent. Rather, it defines a new and vastly more expansive felony that reaches conduct, like failing to keep records, that is unconnected to any IRS agent and can occur in the privacy of one's own home. As such, § 7212(a) looks nothing like the statutes the government invokes that use a catchall provision to reach different ways of accomplishing a prohibited act.[3]

2. The government argues that because the officers clause of § 7212(a) is not limited to pending proceedings, the due administration clause should not be so limited either. Gov't Br. 31. But § 7212(a)'s officers clause is no different from § 1503's officers clause, where a pending proceeding is "irrelevant" for defendants who attack or otherwise impede judicial officers. Department of Justice, Criminal Resource Manual § 1722 (1997) (citing authority). Those cases share a clear parallel to the ones brought under the officers clause of §7212(a) because they typically involve retaliatory attacks against court officers, just as the officers' clause in § 7212(a) is used to punish individuals who retaliate against the IRS. *See*,

---

[3] Nor does the government's interpretation reach wrongdoing not "specifically contemplated" by other provisions. Gov't Br. 34. The government's interpretation has § 7212(a) subsume other, far more specific, criminal provisions of the tax code. *See infra* Part II.

e.g., *United States v. Lovern*, 293 F.3d 695, 697 (4th Cir. 2002).

3. The government also argues that the *ejusdem generis* and *noscitur* canons are inapplicable, primarily because it contends that § 7212(a) does not contain a sufficiently long list of prohibited actions that would shed light on what Congress meant in the due administration clause. Gov't Br. 32. But there is no precise quantum threshold for these canons, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (applying *ejusdem generis* to catchall provision following two other terms), and in any case § 7212(a) contains more than enough additional prohibitions to make the canons applicable. The officers clause prohibits intimidating and impeding officers, and reaches those who do so corruptly, by force, or by threat of force.

The common thread of these prohibitions is that they require interaction with the IRS. Given that commonality, the government's interpretation wrongly expands the due administration clause "to the outer limits of [Congress's] authority" by reaching such conduct as failing to provide information to an accountant or making a payment in cash. *Circuit City Stores*, 532 U.S. at 115. Conversely, the pending proceeding requirement ensures that clause covers conduct "similar in nature" to the officers clause by requiring obstruction in the context of interaction with the IRS. *McDonnell*, 136 S. Ct. at 2372.

C. Section 7212(a)'s Legislative History Supports A Pending Proceeding Requirement

The government emphasizes the modesty of the legislative history regarding the due administration, clause, Gov't Br. 36, but that modesty undermines the government's ambitions for § 7212(a). The conceded focus of § 7212(a)'s legislative history was the *officers* clause, which Congress repeatedly described as being expanded from prior law to address not just forcible obstruction but also corrupt solicitation of IRS officers. Pet'r Br. 37-38. Had Congress intended the officers clause to be superfluous, as the government affirmatively professes, then it likely would not have described the effect of the legislation as resulting in an incremental expansion of that clause. Instead, Congress's focus on the officers clause and relative silence regarding the "due administration" clause indicates that it did not understand the latter clause to wipe away the former and massively broaden § 7212(a). *Cf. Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001) ("Congress... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

D. The Government's "Purpose" Arguments Are Unavailing

The government concludes the first part of its brief by arguing that its interpretation best serves § 7212(a)'s purpose. Gov't Br. 22-24. The reality is that the government's interpretation deprives § 7212(a) of any particular purpose. Rather than punishing the distinct harm of interfering with a pending IRS proceeding,

§ 7212(a) on the government's account serves as a handy device that subsumes more specific offenses while stripping their elements and elevating their penalties.

The government contends that without its sweeping construction of § 7212(a), it will be unable to punish wrongdoers. Gov't Br. 23. But the handful of cases it invokes establishes just the opposite: the government has ample tools to prosecute individuals who take evasive action, make false statements, or engage in other misconduct prior to an IRS enforcement proceeding. Instead, the government is increasingly using § 7212(a) aggressively to bring felony charges for conduct specified to be a misdemeanor. *See generally* N.Y. Council of Defense Lawyers *Amicus* Br. 11-13.

The *single* case the government cites as one in which it was hindered by a pending proceeding requirement is telling. Gov't Br. 24. In that case, a court dismissed a "charge that owner of tax preparation business violated § 7212(a) by directing subordinates to falsify client files in anticipation of routine IRS audits because the audits had not yet begun." *Id.* (citing *United States v. Ogbazion*, No. 15-cr-104 (S.D. Ohio Oct. 17, 2016), D.E. 66). The government neglects to mention that the defendant was also charged with—and convicted of—tax evasion, failure to collect payroll taxes, wire fraud, bank fraud, and conspiracy for that same conduct. Jury Verdict, *United States v. Ogbazion*, No. 15-cr-104 (S.D. Ohio June 6, 2017), D.E. 173.

The government invokes a few other cases where it claims it relied on its sweeping interpretation of § 7212(a), but all of them likewise establish that other statutes already covered the same conduct. *United*

States v. Crim, 451 F. App'x 196, 201 (3d Cir. 2011) (conviction for conspiracy); *United States v. Westbrooks*, 858 F.3d 317, 321 (5th Cir. 2017) (conviction for filing fraudulent tax returns); *United States v. Sorensen*, 801 F.3d 1217, 1220 (10th Cir. 2015) (defendant conceded guilt for tax evasion); *United States v. Madoch*, 108 F.3d 761 (7th Cir. 1997) (convictions for fraud); *United States v. Mitchell*, 985 F.2d 1275 (4th Cir. 1993) (conviction for aiding and assisting preparation of false tax returns).

This case—contrary to the government's assertions—is no different. The government convicted Marinello of eight misdemeanors for willful failure to file tax returns. The government elected not to charge Marinello with tax evasion but it repeatedly took the view in summation that Marinello took evasive action and failed to pay owed taxes. Trial Tr. 496, 503, 507, 516-18. To justify its request for a broad § 7212(a) in this Court, the government now contends that it was prevented from charging Marinello with tax evasion because it could not prove the "specific tax deficiency" that Marinello owed. Gov't Br. 25. But that is not an element of tax evasion. *See Criminal Tax Manual*, Government Proposed Jury Inst. No. 26.7201-14 ("The proof need not show ... the precise amount or all of the additional tax due as alleged." (citing authority)).

II. The Government's Interpretation Cannot Be Reconciled With The Code's Substantive Offenses

The government's interpretation not only fails to make sense of § 7212(a) on its own terms, it violates the basic requirement that a provision should be interpreted to be consistent with the statutory enactment as a whole

to "give coherence to what Congress has done," rather than "produce glaring incongruities." *Achilli v. United States*, 353 U.S. 373, 378-79 (1957). Marinello's opening brief explained that the government's interpretation cannot be reconciled with the tax code's other core crimes that were enacted at the same time as part of the same legislation after years of hearings and debate. Pet'r Br. 40-52. The government has no answer for the "glaring incongruities" that abound on its interpretation, and it largely asks this Court to look past them. The Court should not.

A. The Government's Interpretation Creates Glaring Incongruities

1. At the outset, the government cannot reconcile its interpretation of § 7212(a) with the two offenses that are most closely tied to it: the other offenses set out in § 7212 itself. One of those is the officers clause of § 7212(a), which as explained above, is made wholly superfluous by the government's interpretation despite having been the focus of Congress's attention. *See supra* Part I.B. The other is § 7212(b)'s prohibition against the "forcible rescue" of seized property, which requires proof that the defendant took property by force from the IRS that he knew had been seized. *United States v. Hardaway*, 731 F.2d 1138, 1144 (5th Cir. 1984).

Section § 7212(b) has a maximum sentence that is a year less than what § 7212(a) allows, yet anyone who violates it would necessarily have also violated the government's conception of § 7212(a) by impeding the IRS in order to obtain an unlawful benefit (*i.e.*, the repossession of lawfully seized property). The government opaquely suggests in a footnote, Gov't Br.

at 45 n.7, that a defendant who forcibly reclaims seized property does not necessarily intend to impede the IRS, but it is hard to see how that could be so, and the authority cited by the government does not suggest otherwise.

2a. The government also attempts to disclaim any important overlap between its account of § 7212(a) and the code's core misdemeanors set out in 26 U.S.C. § 7203, because the misdemeanors require a "willful" *mens rea*, while obstruction requires a "corrupt" *mens rea*. That is a distinction without a practical difference in the context of these tax crimes. As this Court has held, the willful *mens rea* is already a highly demanding standard that requires proof that that the defendant knowingly and voluntarily violated the law. For example, to be guilty of the misdemeanor of willfully failing to make a tax payment, § 7203, the defendant must "know" that the law obligates him to make the payment and nevertheless "voluntarily and intentionally" choose not to make it. *Cheek v. United States*, 498 U.S. 192, 201 (1991).

That leaves the government to argue that someone who intentionally did not pay taxes he knew were due might not have done so corruptly, *i.e.*, to obtain an unlawful benefit, such as retaining the money he knew he was obligated to pay over. If those defendants exist, they are rare indeed. If the government can prove that a defendant willfully violated the tax laws, it will virtually always be able to prove that defendant did so to obtain *some* unlawful benefit.[4] Indeed, in its brief in

---

[4] The government also cannot explain why Congress would have wanted to make the willful failure to maintain *required* documents a misdemeanor but the failure to maintain other documents a felony,

opposition, the government seemingly agreed with this proposition when it approvingly cited the Second Circuit's observation that "the term 'corruptly endeavors' in Section 7212(a) is 'as comprehensive and accurate as if the word "willfully" was incorporated in the statute.'" BIO at 12 (quoting *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998)); *see United States v. Williamson*, 746 F.3d 987, 992 (10th Cir. 2014) ("[T]he definition of *willfully* in *Cheek* and the definition of *corruptly* in the instructions in Defendant's trial have much in common."); Dep't of Justice, *Criminal Tax Manual* § 17.04 (2012) (approving Second Circuit's formulation in *Kelly*).

b. The government now conjures defendants who commit these misdemeanors out of "willful but passive neglect," "embarrassment," or some other motive, with no intent whatsoever to obtain an unlawful benefit or advantage. Gov't Br. 42. That conjecture does not account for what willfulness entails in the context of a tax crime and the cases the government cites do not support the distinction.

For example, the government invokes *Spies v. United States*, 317 U.S. 492 (1943) for the proposition that a defendant may engage in "willful but passive neglect" in intentionally failing to pay taxes he knows are due. Gov't Br. 42. From the government's recitation, it sounds as if *Spies* had identified a kind of

---

or why Congress would have made willfully submitting a materially false document a misdemeanor, but also chargeable as felony obstruction. *See* Pet'r Br. 42-47 (discussing 26 U.S.C. § 7203 & § 7207).

defendant who willfully chooses not to pay his taxes but is stonily indifferent to the unlawful benefit he reaps.

Spies says nothing of the sort. In that passage, the Court was instead distinguishing the "willful but passive" defendant who intentionally does not pay his taxes from the defendant who couples that willful omission with an affirmative "willful and positive attempt" to evade his liability, such as by "keeping a double set of books." *Spies*, 317 U.S. at 499. *Spies* holds that the latter defendant is properly charged with felony tax evasion for his affirmative misconduct, while the former can only be charged with a misdemeanor failure to file because he did not undertake an affirmative act of deception. *Id.* Thus, if anything, *Spies* stands for the proposition that Congress does not make tax felonies out of omissions, which is precisely what the government's construction of § 7212(a) does.[5] The government would apparently have the Court believe that Congress intended these core willful offenses to capture defendants who did *not* act with a tax-related motive—that is, who failed to file returns, destroyed required documents, or made false statements on their returns to hide the existence of extramarital affairs and the like.

---

[5] The government similarly argues that a defendant may harass an IRS agent simply to "annoy" him, and invokes an immigration case for the proposition that an immigrant may make false statements out of "embarrassment, fear, or a desire for privacy" rather than to obtain immigration benefits. Gov't Br. 42. Both observations are undoubtedly correct, but they do not suggest that the government will have any difficulty proving that an individual who willfully fails to pay taxes did so, at least in part, to obtain the benefit of not having paid his taxes.

B. Section 7212(a) Should Be Construed To Avoid Those Glaring Incongruities

The obvious and substantial overlap between felony obstruction and the code's other crimes on the government's account leaves the government to argue that such overlap is not "impermissible." Gov't Br. 43. These arguments miss the point. The question is not whether Congress *could* have chosen to make these crimes overlap with felony obstruction, but whether Congress should be understood to have intended to do so in this case. The answer to that latter question is clearly no.

1. First, the government does not even *try* to explain these incongruities. The canon against surplusage is not a mechanical rule, but this Court has repeatedly held the canon has its greatest force where a given interpretation would undercut another provision in the "same statutory scheme." *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (rejecting interpretation "which renders superfluous another portion of that same law"); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 & n.11 (1988) (same) (collecting authority). "The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that most intelligent drafters do not contradict themselves (in the absence of duress). Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, *Reading Law* 180 (2012).

The government simply has no answer as to why Congress would have intended felony obstruction with its three-year maximum sentence to subsume these other crimes with lesser penalties. These were more specific provisions that Congress enacted at the same time, in the same comprehensive legislation designed to cohere previously disparate penalty provisions, including after express debate between the House and the Senate about whether to elevate certain misdemeanor conduct to felonies. Pet'r Br. 8-9. This Court's frequent admonition that legislation should be read "coherently" to avoid internal superfluities and incongruities is at its apex with respect to the unified criminal provisions of the 1954 code. *Achilli*, 353 U.S. at 377-79.

2. The primary tax cases cited by the government—*Spies*, *Sansone*, and *Berra*—only confirm this point. In *Spies*, for example, the government argued that a willful failure to file a tax return (a misdemeanor) could also constitute tax evasion (a felony) under the predecessor to the 1954 Code. The Court *rejected* that argument and instead held that it "would not readily assume that Congress by the felony defined in § 145(b) [tax evasion] meant no more than the same derelictions it had just defined in § 145(a) [willful failure to file] as a misdemeanor." *Spies*, 317 U.S. at 497.

The government notes that *Spies* ultimately concluded Congress distinguished the felony and misdemeanor provisions by construing the former to require an affirmative act and the latter to be complete with only an omission, a distinction that the government apparently believes to be minor. But it is a key

distinction between the Code's misdemeanors and felonies, that mere omissions—even willful ones—generally only give rise to misdemeanors. This Court's more recent cases have continued to employ this framework. *See Sansone v. United States*, 380 U.S. 343, 351–52 (1965) (explaining distinction between felony evasion and misdemeanor failure to pay); *United States v. Bishop*, 412 U.S. 346, 359 (1978) (citing distinction approvingly); American College of Tax Counsel *Amicus* Br. 32-33.

The government points to the fact that *Sansone* allowed the government to charge felony tax evasion based solely on facts that "covered precisely the same ground" as two misdemeanor provisions (failure to pay a tax under 26 U.S.C. § 7203 and filing a false document under 26 U.S.C. § 7207). But that part of *Sansone*, like *Berra v. United States*, 351 U.S. 131 (1956), simply stands for the unremarkable proposition that defendants who commit felony tax evasion will also be guilty of the misdemeanor of willfully failing to pay taxes. Nothing in these cases blesses the government's contention that this Court should assume that Congress intended that misdemeanor conduct should also give rise to a felony in the same enactment.

3. The government cites other non-tax cases as if they establish that overlapping criminal statutes are unproblematic, but those cases actually show that the Court will *not* construe criminal statutes as overlapping unless all the tools of statutory construction dictate that result. For example, in *United States v. Batchelder* the Court emphasized that nothing in the "language, structure, or legislative history" of the provisions

supported the defendant's position. 442 U.S. 114, 118 (1979). In *Loughrin*, the Court rejected the defendant's position in substantial part *because* it would have resulted in one provision of the statute in question subsuming another offense. 134 S. Ct. at 2390.

In short, the government has "no justification" for why Congress would have created overlapping statutes in this case that undermine the careful scheme of offenses that it adopted in the 1954 code.

III. The Government's Interpretation Reaches Conduct Congress Never Intended To Criminalize And Poses A Grave Danger of Prosecutorial Abuse

The government's interpretation is not just inconsistent with other criminal prohibitions in the code, it also sweeps in vast amounts of conduct that Congress never intended to criminalize, let alone make a felony. As the business, tax expert, and defense *amici* supporting Marinello have all explained, under the government's interpretation individual and business taxpayers can face a felony obstruction prosecution not just for having intentionally underpaid their taxes, but simply for having taken acts or omissions, outside the context of any tax proceeding, that make it harder for the IRS to later *assess* their tax position in the first instance.

In the context of an enforcement proceeding of which the taxpayer has notice, § 7212(a) appropriately punishes acts that impede the IRS's ability to carry out the proceeding. But outside the context of a proceeding, defining obstruction as conduct that may someday

impede the IRS's ability to assess a tax position makes the *actus reus* of obstruction essentially unlimited. For an individual, it could be the failure to keep receipts or maintain other records. And as the *amicus* brief of the Chamber of Commerce explains, Br. 4-16, businesses routinely make all sorts of decisions—including structuring, withholding, or deduction decisions, to name just a few—that have the effect of making it more difficult for the IRS to determine the corporation's tax obligations. Other examples abound, such as

- A taxpayer who instructs her bookkeeper to save every document required by IRS regulations, but not a single document more;
- A taxpayer who chooses not to share complete information with an accountant, or simply not to consult with an accountant at all; or
- A business owner who encrypts sensitive files so that outsiders cannot access them without her permission.

The government pointedly does not deny, Gov't Br. 46-47, that conduct of this kind can support a felony obstruction conviction on its view, even where there is no hint that the defendant underpaid his taxes. Instead, it contends that the statute's corrupt *mens rea* will serve to distinguish culpable taxpayers, *id.*, but with so many obstructive acts to choose among, a motivated prosecutor will easily be able to find one that he can convince a grand jury did not just have the *effect* of obstructing the IRS's assessment efforts but was *intended* to.

The government points to the safeguards provided by a jury trial, Gov't Br. 46, but as the dissenters in the Second Circuit and the defense *amici* explain, the allegation of a felony—particularly where the bad act is established and the only question is whether the defendant intended the consequences of his actions—is likely to lead to a plea in most cases anyway. Pet. App. 45a; N.Y. Council of Defense Lawyers *Amicus* Br. 24-25. That is why in cases like *Aguilar* and *Arthur Andersen*, this Court has refused to construe crimes with a "corrupt" *mens rea* to acts and omissions beyond what Congress clearly meant to cover. *Aguilar*, 515 U.S. at 600; *Arthur Andersen LLP v. United States* 544 U.S. 696, 704-05 (2005).

As Judge Hand famously said, "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury." *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934). Section 7212(a) likewise does not obligate the taxpayer "to arrange his affairs" in a way that makes it maximally easy for the IRS to determine his tax position on pain of a felony if he does not. Individuals who willfully fail to pay taxes, maintain required records, or commit other substantive offenses are already subject to a battery of civil penalties and criminal punishments. In the absence of any indication from Congress that it meant to sweep so broadly and in light of the legitimate conduct that doing so would chill, this Court should hold that § 7212(a) punishes conduct that obstructs IRS proceedings and not all conduct that could turn out to impede the IRS in any way.

IV. To The Extent The Court Finds § 7212(a) Ambiguous, The Rule Of Lenity Warrants Reversal

In the event the Court finds § 7212(a) to be ambiguous, reversal is warranted under the rule of lenity. This is not merely a case where "it is *possible* to articulate an interpretation more narrow than that urged by the government," Gov't Br. at 37, but one in which there are strong grounds based on the text and structure of the provision, as well as the relevant case law, to read it more narrowly.

If Congress intended to criminalize the vast sweep of conduct the government claims and to obviate other more specific crimes, then the rule of lenity counsels that "[b]efore we choose the harsher alternative, [we] require that Congress ... have spoken in language that is clear and definite." *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

JOSEPH M. LATONA
403 Main Street
716 Brisbane Building
Buffalo, NY 14203

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
DAVID BITKOWER
MICHAEL E. STEWART
CORINNE M. SMITH
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

November 22, 2017

RECORD AND BRIEFS

FILED
SEP - 8 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1144

IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ARMANDO GOMEZ
DAVID W. FOSTER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
202-371-7000

JENNY L. JOHNSON
Counsel of Record
GUINEVERE M. MOORE
JOHNSON MOORE LLC
150 North Wacker Drive
Suite 1250
Chicago, IL 60606
312-549-9990
Jenny.johnson@
jmtaxlitigation.com

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Without a Narrowing Interpretation from this Court, the Residual Clause of § 7212(a) Presents Grave Constitutional Concerns. 4

A. The Residual Clause of § 7212(a) Fails to Give Fair Notice of the Conduct it Punishes 4

B. The Residual Clause of § 7212(a) is So Standardless that it Invites Arbitrary Enforcement. 11

1. Courts have Struggled to Craft Principled and Intelligible Boundaries Around the Residual Clause. 11

2. Prosecutors have Abandoned All Objective Standards Limiting Prosecutions Under the Residual Clause. 18

TABLE OF CONTENTS

Page(s)

II. This Court Should Interpret the Residual Clause of § 7212(a) as a Specialized Tool Within the Tax Enforcement System. 20

A. To Interpret § 7212(a), the Court Must Consider its Role in the Tax Enforcement System..... 21

B. Tethering the Residual Clause to an Existing Proceeding Prevents it from Subsuming the Other Tax Crimes and Provides the Nexus Required for Intent to Obstruct. 24

C. § 7212(a) Must Require Knowledge of Illegality and an Affirmative Act. 27

1. Requiring Knowledge of Illegality as an Element of a Tax Crime is Necessary to Preserve Due Process. 27

2. § 7212(a) Should Not be an Exception to the Rule that Tax Felonies Require an Affirmative Act..... 31

D. Any Broader Reading of § 7212(a) Threatens to Undermine the Tax Enforcement System..... 33

CONCLUSION..... 35

TABLE OF AUTHORITIES

Page(s)

CASES:

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 3, 26

Badaracco v. Commissioner,
464 U.S. 386 (1984) 8

Champlin Ref. Co. v. Corp. Comm'n,
286 U.S. 210 (1932) 10

Cheek v. United States,
498 U.S. 192 (1991) 27, 28, 29

Clark v. Martinez,
543 U.S. 371 (2005) 20, 21

Johnson v. United States,
135 S. Ct. 2551 (2015) 4, 11, 18

McDonnell v. United States,
136 S. Ct. 2355 (2016) 19, 20

McNally v. United States,
483 U.S. 350 (1987) 21

Pettibone v. United States,
148 U.S. 197 (1893) 26

Skilling v. United States,
561 U.S. 358 (2010) 20

TABLE OF AUTHORITIES

Page(s)

Spies v. United States,
317 U.S. 492 (1943).....22, 23, 31

United States v. Aguilar,
515 U.S. 593 (1995)..... 12, 26

United States v. Bishop,
412 U.S. 346 (1973)..... 28

United States v. Bowman,
173 F.3d 595 (6th Cir. 1999).....13, 14, 26, 27

United States v. Dean,
487 F.3d 840 (11th Cir. 2007)..... 30

United States v. Floyd,
740 F.3d 22 (1st Cir. 2014) 15

United States v. Giambalvo,
810 F.3d 1086 (8th Cir. 2016)..... 17

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998).....12, 13, 14, 26

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998) 4, 29, 30

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) .....*passim*

TABLE OF AUTHORITIES

Page(s)

United States v. Marinello,
855 F.3d 455 (2d Cir. 2017) 33

United States v. Massey,
419 F.3d 1008 (9th Cir. 2005) 15

United States v. Miner,
774 F.3d 336 (6th Cir. 2014) 14, 26, 27

United States v. Popkin,
943 F.2d 1535 (11th Cir. 1991) 4, 16

United States v. Reeves,
752 F.2d 995 (5th Cir. 1985) 11, 15, 16

United States v. Saldana,
427 F.3d 298 (5th Cir. 2005) 4, 30

United States v. Sorensen,
801 F.3d 1217 (10th Cir. 2015) ..... *passim*

United States v. Sun-Diamond Growers,
526 U.S. 398 (1999) 20

United States v. Walasek,
527 F.2d 676 (3d Cir. 1975) 26

United States v. Williams,
644 F.2d 696 (8th Cir. 1981) 12, 18

TABLE OF AUTHORITIES

Page(s)

United States v. Williamson,
746 F.3d 987 (10th Cir. 2014) 29, 30

United States v. Wood,
384 F. App'x 698 (10th Cir. 2010) 32

U.S. Civil Service Comm'n v. Letter Carriers,
413 U.S. 548 (1973) 20

Yates v. United States,
135 S. Ct. 1074 (2015) 11, 21

STATUTES AND REGULATIONS:

18 U.S.C. § 1503 ..... 12, 16, 25

26 U.S.C. § 7201 24

26 U.S.C. § 7202 23

26 U.S.C. § 7203 ..... 24, 25, 32

26 U.S.C. § 7206(1) 24, 27

26 U.S.C. § 7206(2) 24

26 U.S.C. § 7212 ..... 12, 16, 32

26 U.S.C. § 7212(a) ..... *passim*

TABLE OF AUTHORITIES

Page(s)

26 U.S.C. § 7215 24

31 C.F.R. § 10.21 8

Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 855 ..... 11, 25

RULES:

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES:

Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. Kan. L. Rev. 847 (1999) 7

Department of Justice Tax Division, Directive No. 77 (1989), *superseded by* Directive No. 129 (2004) 18, 19

John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 Fordham L. Rev. 2721 (2016) 6

Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681 (1997) 7

TABLE OF AUTHORITIES

Page(s)

Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. Rev. Online 152 (2015) 35

U.S. Dep't of Justice, Criminal Tax Manual § 2.00 (2012), https://www.justice.gov/sites/default/files/tax/legacy/2015/03/27/CTM%20Chapter%202.pdf 34

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner Carlo J. Marinello, II.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;

---

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

Effective tax enforcement requires uniform, predictable and comprehensible distinctions between lawful business practices and felonies. The College submits this *amicus* brief because it is deeply concerned that the lower courts' unbounded reading of the residual clause in 26 U.S.C. § 7212(a) erases those distinctions and impermissibly shifts the power to define criminal liability to prosecutors. Narrowed appropriately, the residual clause in § 7212(a) has a specialized role to play in combating obstruction of tax enforcement. Read broadly, it threatens principles at the foundation of our system of justice and creates undue risk for both taxpayers and Fellows of the College who have devoted their careers to helping taxpayers navigate the tax laws.

SUMMARY OF ARGUMENT

The Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citation omitted). Desire to ensure fair warning and deference to Congress coincide to point unequivocally in the direction of a narrow reading of the residual clause of § 7212(a).

The unbounded reading of § 7212(a) espoused by the Government and adopted by the court below deprives taxpayers and their advisors of fair notice of the conduct it punishes, and invites arbitrary enforcement by prosecutors empowered with vast discretion. These potential constitutional infirmities militate in favor of a narrow reading of § 7212(a) that recognizes its specialized role in the comprehensive tax enforcement system enacted by Congress and adopts the safeguards that Congress and the courts have developed to ensure due process in prosecutions for tax crimes and obstruction of justice.

Narrowed appropriately, § 7212(a) is a tool to combat interference with an identifiable tax enforcement activity by a defendant who commits an affirmative act to obstruct or impede with knowledge of that activity and intent to gain an advantage he knew to be unlawful. Any broader reading would implicate constitutional principles and eviscerate the

comprehensive tax enforcement system Congress enacted.

ARGUMENT

I. Without a Narrowing Interpretation from this Court, the Residual Clause of § 7212(a) Presents Grave Constitutional Concerns.

The Court recently confirmed that the Government violates the guarantee of due process "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). The unbounded reading of the residual clause espoused by the Government and adopted by the court below has both vices of a vague statute.

A. *The Residual Clause of § 7212(a) Fails to Give Fair Notice of the Conduct it Punishes.*

The residual clause of § 7212(a) makes it a felony to "in any other way corruptly . . . obstruct[ ] or impede[ ], or endeavor[ ] to obstruct or impede, the due administration of this title." The lower courts have defined "corruptly" to mean "with intent to gain an unlawful advantage or benefit either for oneself or another." *See, e.g.*, *United States v. Sorensen*, 801 F.3d 1217, 1224 (10th Cir. 2015); *United States v. Saldana*, 427 F.3d 298, 305 (5th Cir. 2005); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991). Taking false comfort from the "corruptly"

mens rea requirement, the Second Circuit in the decision below refused to limit the scope of § 7212(a) to interference with a pending Internal Revenue Service ("IRS") action of which the defendant was aware, and found that no affirmative act is necessary for this felony. *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016). Read that broadly, § 7212(a) criminalizes *any* act or omission that could potentially make *any* aspect of the IRS's job harder in *any* way as long as the defendant committed the act or omission with an intent to gain an unlawful benefit—whether or not the defendant knew the benefit was unlawful, whether or not the act or omission was itself a lawful act, whether or not the defendant acted deceitfully, whether or not the defendant could foresee any nexus between the act or omission and the IRS, and whether or not the act or omission occurred within the adversarial process.

The Government argues that "unlike justice administered in a court proceeding—which is a defined, discrete event—tax administration is continuous, ubiquitous, and universally known to exist." Resp't's Br. in Opp'n at 9. It is precisely this continuous, ubiquitous, and universal nature of tax administration that renders an unbounded interpretation of the residual clause of § 7212(a) unconstitutionally vague. In administering the tax code, the IRS plays every conceivable role: lawmaker when it promulgates regulations and rulings; administrator when it processes returns and payments; investigator when it conducts civil audits or criminal investigations; settlement officer when the Office of Appeals considers a disagreement between the taxpayer and examiner; litigator when

attorneys in the Office of Chief Counsel represent the IRS in adversarial court proceedings; decision-maker when it rules on Private Letter Ruling requests; and ethics board when it creates rules for practice before the IRS and enforces those rules through its Office of Professional Responsibility. Countless otherwise lawful acts or omissions could impede the IRS in one of its myriad roles. By giving prosecutors the discretion to convert any one of those countless acts or omissions into a federal felony, the residual clause violates the Constitution's prohibition on vague criminal laws.

Tax lawyers, including Fellows of the College, face an especially heightened risk of wrongful prosecution without fair notice under the residual clause of § 7212(a). Tax lawyers owe duties of confidentiality and zealous advocacy to their clients that often compete with an ill-defined duty to the tax system that may morph depending on whether the lawyer is engaged in tax planning, audit defense, litigation or any other type of interaction with the IRS. Defining the duties owed to the IRS in each context, and striking the right balance between those duties and often conflicting duties owed to taxpayer clients, is no easy feat. Indeed, the scope of these duties and appropriate resolution of the inevitable conflicts between them are the subject of significant dispute and consternation.[2] These are

---

[2] *See, e.g.*, John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 Fordham L. Rev. 2721, 2725 (2016) (describing the longstanding debate over the tax lawyer's role and arguing that, although the lawyer has a duty to the *(cont'd)*

muddy waters for even the most experienced tax lawyers, and the Second Circuit's reading of § 7212(a) gives prosecutors the unfettered right to decide that a lawyer's attempt to strike the right balance was not only erroneous, but may be charged as felony obstruction. Tax lawyers already forced to sail through Scylla and Charybdis to comply with their ethical obligations should not face the additional threat of felony prosecution on one side of the strait.

Without a narrowing interpretation of § 7212(a), the line between effectively representing a taxpayer and what a prosecutor could charge as corruptly impeding the IRS is nonexistent. For example, when handling an audit, the taxpayer's lawyer may discover that the taxpayer underpaid his tax. In our adversarial system of justice, there is no duty imposed on the lawyer to expose flaws in the taxpayer's returns or recordkeeping during an IRS audit. Indeed, the lawyer is obligated to preserve the confidentiality of information shared by the taxpayer within the attorney-client privilege and to

---

(cont'd from previous page)
system, "concrete guidance" on the scope of that duty is needed); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. Kan. L. Rev. 847, 851 (1999) (recognizing the contested question of how a tax lawyer's duties conflict and arguing that there is no discrete duty by the lawyer to the tax system); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681, 687-88 (1997) (taking the position that when a lawyer's two duties collide, the duty to the system takes priority).

help the taxpayer minimize his exposure for additional tax and criminal or civil penalties to the extent she can do so within her ethical obligations. As interpreted by the Second Circuit, however, § 7212(a) authorizes felony prosecution for an omission that impedes the administration of the tax code if it is committed with intent to gain an unlawful advantage for oneself or another. Is the tax lawyer's failure to notify the IRS of her client's tax deficiency, committed with intent to gain an unlawful advantage for her client in the form of a lower tax liability, a felony under § 7212(a)?

Similarly, what risk might a tax lawyer (or her client) face when the newly retained tax lawyer discovers through a review of the client's financial records and previously filed tax returns that certain items of income were not properly reported on those returns? Treasury regulations counsel that the tax lawyer who knows that her client has not complied with the tax laws, or has made an error or omission in his return, must "advise the client promptly of such noncompliance, error, or omission" and "the consequences . . . of such noncompliance, error, or omission." 31 C.F.R. § 10.21. This Court has held that the tax code does not require the filing of amended returns. *Badaracco v. Commissioner*, 464 U.S. 386, 397 (1984). If the tax lawyer explains the law to her client and the client elects not to amend his returns in the hope that the IRS does not select his returns for examination, can the lawyer or her client be prosecuted under § 7212(a) for such failure to act?

Consider also that tax lawyers handling IRS audits routinely receive requests for an interview of

the taxpayer. Participating in that interview is often not in the taxpayer's best interests, and an effective lawyer would advise the client of the risks of an interview and then attempt to avoid it. Is it a violation of § 7212(a) for the lawyer to stall the auditor and avoid scheduling the interview? Is it a violation of § 7212(a) to schedule the interview, but advise the taxpayer to assert his Fifth Amendment privilege against self-incrimination throughout the interview? Either way, the tax lawyer is impeding the IRS in its effort to administer the tax code, and doing so with the intent to gain an unlawful advantage for her client in the form of a lower tax liability. There is nothing in § 7212(a) to distinguish deceitful dodging from honest stalling, or to differentiate protection of Constitutional privileges from other kinds of stonewalling.

Similar obstruction of the IRS happens routinely in the normal course of litigation between taxpayers and the IRS. Indeed, the central issue in tax litigation is typically whether the taxpayer was entitled to the reduced tax liability he claimed, or whether the reduction was an "unlawful benefit." If, at the conclusion of the litigation, the court finds that the taxpayer's correct tax liability was higher than he reported on his return, is everything the taxpayer and his lawyer did to impede the IRS in its effort to win the case—such as objecting to interrogatories or disputing requests to admit—suddenly a felony in hindsight? Nothing in § 7212(a) carves out actions taken in the course of litigation maintained in good faith.

In addition to the risks of wrongful prosecution arising from adversarial interactions with the IRS,

there are also countless actions or omissions that could trigger a prosecution under § 7212(a) even though the eventual impact on the IRS is both unforeseen and unforeseeable. For example, a small restaurant may store its register tapes and other records in the basement. If, when installing a new freezer, the owner's son runs the electrical wires himself to avoid the cost of hiring a licensed electrician, he will have acted with intent to secure an unlawful benefit for the restaurant in the form of money saved by not complying with the local building code. If a fire caused by the faulty wiring destroys the register tapes and other records, and the IRS subsequently audits the restaurant, the lack of records would impair the IRS's ability to examine the restaurant's income. The restaurant owner's son, therefore, could be prosecuted under the residual clause of § 7212(a) because actions he took with intent to gain an unlawful benefit for the restaurant impeded the administration of the tax code. Although local building codes are certainly important, a failure to comply should not become a federal felony simply because it kicks off a chain of events that makes the IRS's job harder at some point in the future.

As this Court recognized long ago, "[i]t is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 243 (1932) (citations omitted). Under the reading espoused by the Government and adopted by the court below, the residual clause of § 7212(a) is really no rule or standard at all, yet it touches "every

aspect of economic life." *United States v. Reeves*, 752 F.2d 995, 999 (5th Cir. 1985). Such a pervasive yet simultaneously indefinite criminal statute does not pass Constitutional muster.

B. *The Residual Clause of § 7212(a) is So Standardless that it Invites Arbitrary Enforcement.*

In addition to failing to give ordinary people—or even highly educated tax lawyers—fair notice of what conduct is proscribed, the residual clause of § 7212(a) impermissibly shifts the balance of power "between 'the legislature, the prosecutor, and the court in defining criminal liability.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). Like the residual clause in *Johnson*, the residual clause in § 7212(a) "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2258. In *Johnson*, the Court found that "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.* The lower courts have been unable to define any consistent, intelligible boundaries for § 7212(a) and the Government has progressively abandoned all objective standards it previously applied in self-restraint.

1. *Courts have Struggled to Craft Principled and Intelligible Boundaries Around the Residual Clause.*

Although § 7212(a) was enacted with the Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat.

855, the Government refrained from using the residual clause for over twenty-five years. In the first reported appellate decision interpreting the residual clause, the court noted that it could find no other cases brought by the Government and would, therefore, "proceed cautiously where for over twenty-five years the Government has feared to tread." *United States v. Williams*, 644 F.2d 696, 699 (8th Cir. 1981). In *Williams*, the government acknowledged that it had previously asserted that § 7212 applied only to situations involving force or threats of force, but characterized that position as "timid" and sought a more expansive interpretation of the statute. *Id.* at 699 n.12. The court in *Williams* agreed, finding that "the broad language of section 7212's omnibus clause demands a correspondingly broad construction." *Id.* at 700. Since then, the Government's continuing efforts to expand the scope of § 7212(a) have met with some trepidation from the lower courts, but no uniform, predictable, or comprehensible limits on prosecutorial discretion.

The Court of Appeals for the Sixth Circuit has made the most progress toward articulating an intelligible boundary on the scope of § 7212(a). Relying heavily on this Court's interpretation of 18 U.S.C. § 1503 in *United States v. Aguilar*, 515 U.S. 593 (1995), and observing that the residual clause in § 7212(a) contains language virtually identical to § 1503, the Sixth Circuit construed the omnibus clause as requiring proof that a defendant was aware of "some pending IRS action" when he engaged in the potentially impeding conduct. *United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998). The

Kassouf court correctly expressed concern that broader application of § 7212(a) could "open[ ] the statute to legitimate charges of overbreadth and vagueness" and reluctance to construe the statute to impose criminal liability on a defendant who "may have no idea that conduct such as the failing to maintain records (before his tax returns were ever filed) might obstruct IRS action because he had no specific knowledge that the IRS would ever investigate his activities." *Id.* at 958.

The following year, a different panel of the Sixth Circuit held that *Kassouf* should be limited to its precise holding and facts, and that § 7212(a) may apply to defendants who anticipatorily try to impede the administration of the internal revenue laws before the pendency of any IRS proceeding. *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999). In *Bowman*, the defendant was prosecuted under § 7212(a) after he attempted to prompt an IRS investigation into several of his creditors by filing forms with the IRS that falsely indicated that his creditors had received taxable income. *Id.* at 599. The court opined that "[a]ll of the reasoning in *Kassouf* supports the conclusion that an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within § 7212(a)'s proscribed conduct," and differentiated the two cases factually on the grounds that "[t]he filing of false tax forms is not legal when undertaken; it is not speculative; it is specifically designed to cause a particular action on the part of the IRS." *Id.* at 600.

Most recently, the Sixth Circuit found that "although *Bowman* purported to limit *Kassouf* to its facts, it would be more accurate to conclude that the opposite is true." *United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014). As explained by the court in *Miner*, *Kassouf* "applies to defendants whose conduct in failing to disclose or in peculiarly structuring their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds," *id.* at 345 (citing *Kassouf*, 144 F.3d at 953), while *Bowman* "is reducible to a rule that a defendant who intentionally attempts to instigate a frivolous IRS proceeding cannot claim to have lacked the necessary intent to impede the IRS's administration of its statutory duties with respect to that proceeding." *Id.* (citing *Bowman*, 173 F.3d at 600). The court found, therefore, that the government erred in characterizing "*Kassouf* as an exception to *Bowman*, rather than the other way around." *Id.* at 344. In an effort to reconcile the two earlier decisions, the *Miner* court noted that "*Bowman*, in rejecting *Kassouf*'s application to a defendant who was attempting to instigate a frivolous IRS proceeding rather than to impede a preexisting one, did so primarily because it believed that the indicia of intent to impede were patently obvious." *Id.*

The state of the law in the Sixth Circuit, therefore, appears to be that the government must prove that the defendant was aware of a specific IRS action at the time of the potentially impeding conduct, unless the intent to impede is "patently obvious." Rules with undefined and inarticulable exceptions are no longer rules, and cannot transform

an unconstitutionally vague criminal law into one that complies with the Due Process Clause.

Moreover, the Sixth Circuit's efforts to define some boundary around § 7212(a) have met with disagreement from every other circuit that has considered the issue. *Marinello*, 839 F.3d 209; *United States v. Sorensen*, 801 F.3d 1217 (10th Cir. 2015); *United States v. Floyd*, 740 F.3d 22 (1st Cir. 2014); *United States v. Massey*, 419 F.3d 1008 (9th Cir. 2005). Refusing to impose any similar boundaries on prosecutions under § 7212(a), the other courts misguidedly rely on the "corruptly" *mens rea* to differentiate lawful conduct from felony obstruction. *Marinello*, 839 F.3d 209, 222 ("[O]ther courts . . . have decided that section 7212(a)'s '*mens rea* requirement' sufficiently 'restricts the omnibus clause's reach. . . .'" (citing *Miner*, 744 F.3d at 347)).

In *United States v. Reeves*, 752 F.2d 995 (5th Cir. 1985), the court noted that it had "upheld section 1503 as not unconstitutional on vagueness grounds largely because the statute covers only actions related to pending judicial proceedings, thus providing adequate notice to potential violators." *Id.* at 999 (citing *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978)). The court recognized, however, that the "narrow circumstances in which section 1503 applies have no parallel in cases involving section 7212(a)" because the IRS "is permitted great power to intrude on, and investigate virtually every aspect of economic life to effect its purpose of administering the tax laws." *Id.* at 999. The court, therefore, sought to provide the notice required for due process by construing the statutorily-undefined "corruptly" *mens rea*. The

court found no cases interpreting the word "corruptly" in § 7212, so it looked to a case construing the term in § 1503 and the legislative history of § 7212 to craft a definition. Drawing on a Senate report that provided one example of what the statute meant by "corruptly endeavor," the court found that the example—corrupt solicitation—was a paradigm of a corrupt endeavor. *Id.* at 1000-01. The court, therefore, defined "'corruptly' endeavoring to impede or obstruct Title 26 as forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another." *Id.* at 1001.

Subsequent decisions adopting this definition shed light on the persisting lack of clarity in § 7212(a). For example, in *United States v. Sorensen*, the defendant used trusts to reduce his taxable assets, and insisted at trial that he did not know that the use of the trusts or the reduction in his tax liability was unlawful. 801 F.3d at 1229-30. The district court refused to give the defendant's requested jury instruction that to find him guilty, the jury must find that he knew the use of the trusts was illegal. *Id.* at 1229. The Tenth Circuit affirmed, finding that it need not decide whether the definition of corruptly requires knowledge of illegality. *Id.* at 1230.

While leaving open the question of whether § 7212(a) requires that the defendant knew that the benefit he sought was unlawful, the courts have found that the defendant need not have committed any unlawful act because "an otherwise lawful act could violate the statute by being carried out for a corrupt purpose or in a corrupt manner." *United States v. Popkin*, 943 F.2d 1535, 1538 (11th Cir.

1991) (affirming conviction of an attorney who formed a domestic corporation). Moreover, the unlawful benefit need not have any relationship to tax administration, or even constitute a financial benefit. *United States v. Giambalvo*, 810 F.3d 1086, 1098 (8th Cir. 2016) (rejecting the argument that "the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage" (quoting *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992))). In other words, a lawful act committed with intent to secure any sort of economic or non-economic benefit that turns out to be unlawful—even if the defendant had no knowledge of illegality—is sufficient for prosecution under § 7212(a) as it has been interpreted by the lower courts.

Finally, in the decision below, the Second Circuit eliminated any vestige of a limitation on the scope of § 7212(a) by not only disavowing the Sixth Circuit's pending action requirement, but by announcing that § 7212(a)—unlike every other tax felony—requires no affirmative act by the defendant. The court acknowledged that "the scope of omissions on which an omnibus clause violation could be based is not limitless," but provided no other guidance about where that line might be drawn. *Marinello*, 839 F.3d at 225 n.15 (citing *United States v. Wood*, 384 F. App'x 698, 708 (10th Cir. 2010)). Instead, the court simply concluded that "[w]hatever those limits may be, the omissions at issue here do not exceed them." *Id.* at 225 n.15.

Prosecutions under the residual clause of § 7212(a) are a morass of uncertainty because the lower courts have failed to articulate any principled,

intelligible, and predictable boundaries on its scope. As in *Johnson*, "the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause." 135 S. Ct. at 2562.

2. *Prosecutors have Abandoned All Objective Standards Limiting Prosecutions Under the Residual Clause.*

After rejecting its previous "timid" interpretation of § 7212(a) in 1981, *Williams*, 644 F.2d at 699, the Government has steadily expanded its interpretation of the residual clause, abandoning all objective criteria it previously used to define when a prosecutor could charge a violation of § 7212(a). In 1989, the Department of Justice Tax Division issued Directive No. 77, which stated:

> In general, the use of the "omnibus" provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed—typically conduct designed to impede or obstruct an audit or criminal tax investigation. . . . However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties.

This policy provided at least some intelligible boundaries: the residual clause of § 7212(a) could be used to charge obstructive conduct after a tax return was filed, which by nature typically involves an audit or investigation, or large-scale obstructive conduct involving liabilities of third parties, which

by nature foreseeably impacts the administration of the tax laws. In both situations, there would be a nexus between the conduct at issue and the due administration of the tax laws that was not wholly speculative.

That directive, however, was superseded in 2004 by Directive No. 129, which instead instructs prosecutors that:

> A § 7212(a) omnibus clause charge is particularly appropriate for corrupt conduct that is intended to impede an IRS audit or investigation. . . .
>
> A § 7212(a) omnibus clause charge can also be authorized in appropriate circumstances to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties.

The notion that the residual clause of § 7212(a) should be reserved for conduct occurring after a tax return has been filed disappeared entirely from the policy in 2004. This policy shift significantly broadened the potential for abuse by individual prosecutors because it opened the door to prosecutions where there was no foreseeable nexus between the defendant's conduct and the administration of the tax laws, and to prosecutions for felony obstruction based on conduct described elsewhere in the code as a misdemeanor.

The Government's continuous expansion of its own reading of § 7212(a) illustrates the difficulty of defining intelligible boundaries around the residual clause and underscores that the Court "cannot

construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010)); *see also United States v. Sun-Diamond Growers*, 526 U.S. 398, 408 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions). Rather, this Court should either give the lower courts the necessary guidance to interpret § 7212(a) uniformly by crafting articulable, objective boundaries around the residual clause, or let Congress fill the void with an appropriately drafted statute.

II. This Court Should Interpret the Residual Clause of § 7212(a) as a Specialized Tool Within the Tax Enforcement System.

If this Court chooses to save the residual clause from constitutional infirmity, principles of statutory interpretation demand a narrow reading of § 7212(a) as a specialized tool within the tax enforcement system. This Court has previously recognized that when a statute's constitutionality is in doubt, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *U.S. Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973); *see also Skilling v. United States*, 561 U.S. 358, 403 (2010). The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-382

(2005) (citing *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), and *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The canon is a "means of giving effect to congressional intent, not of subverting it." *Id.* at 382. In addition, under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court should] choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted).

The Court can honor the rule of lenity and give effect to Congressional intent by recognizing that § 7212(a) is a specialized tool within the comprehensive tax enforcement system designed by Congress and that the safeguards Congress and the courts adopted to ensure due process in prosecutions for tax crimes and obstruction of justice apply equally to § 7212(a).

A. *To Interpret § 7212(a), the Court Must Consider its Role in the Tax Enforcement System.*

In *Yates v. United States*, 135 S. Ct. 1074 (2015), the plurality, concurrence, and dissent all agreed that statutory terms should be interpreted "in their context and with a view to their place in the overall statutory scheme." *Id.* at 1092 (Kagan, J., dissenting) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Members of the Court disagreed about which direction the context pointed in that case, but uniformly embraced the approach of looking to how the provision at issue fit

in the overall statutory scheme. When interpreted in context and with a view to its place in the overall statutory scheme, it is readily apparent that Congress intended § 7212(a) to perform a specific role within the tax enforcement system rather than to serve as a catchall felony for prosecutors to use at their whim.

Interpreting tax crimes by looking at their role in the structure of sanctions imposed by Congress is nothing new. Indeed, when called upon to interpret the felony offense of tax evasion, the Court looked to "its context in the revenue laws." *Spies v. United States*, 317 U.S. 492 (1943). As the Court explained in *Spies:*

> Congress has imposed a variety of sanctions for the protection of the system and the revenues. The relation of the offense of which this petitioner has been convicted to other and lesser revenue offenses appears more clearly from its position in this structure of sanctions.

Id. at 495. The Court described the escalating civil penalties corresponding to different levels of intent, the misdemeanor for willful failure to pay tax when due, and the tax evasion felony at the "climax" of available sanctions. Acknowledging that the "difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define," the Court sought to distinguish them because "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the

same derelictions it had just defined . . . as a misdemeanor." *Id.* at 497.

The *Spies* Court found the distinction between the misdemeanor and the felony in the "affirmative action implied from the term 'attempt', as used in the felony." *Id.* at 498. As explained by the Court:

> We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Id. at 499. The distinction between the tax misdemeanors and felony evasion crafted by the Court in *Spies* remains a core principle at the heart of the tax enforcement system.

The tax enforcement system enacted by Congress and interpreted by the courts creates uniform, predictable, and comprehensible distinctions between lawful conduct, misdemeanors, and felonies. With very few well-defined and limited exceptions for taxpayers in special roles,[3] the tax felonies

---

[3] There are two types of willful failures to act that Congress specifically chose to treat as felonies rather than misdemeanors: the willful failure of a withholding agent to collect, account for, and pay over tax, which is a felony under § 7202, and the willful failure of a person *(cont'd)*

require willful commission of an affirmative act. *See* 26 U.S.C. § 7201 (tax evasion), § 7206(1) (filing a fraudulent return), § 7206(2) (aiding and assisting in preparation of a false return). The common failures to act—failure to pay tax, failure to file a return, failure to keep records, and failure to supply information—are all misdemeanors under 26 U.S.C. § 7203. When viewed in context, it becomes apparent that the Government's sweeping interpretation of § 7212(a) would make it an outlier in an otherwise coherent tax enforcement system and subvert Congressional intent.

B. *Tethering the Residual Clause to an Existing Proceeding Prevents it from Subsuming the Other Tax Crimes and Provides the Nexus Required for Intent to Obstruct.*

Given the care that both Congress and the courts have devoted to refining uniform, predictable, and

---

(cont'd from previous page)
engaged in a trade or business to comply with the currency transaction reporting requirements, which is a felony under § 7203. There is also one misdemeanor in the tax code that does not specifically require willfulness, but incorporates knowledge of illegality into the intent standard in a different way. If a person required to collect, account for, and pay over tax fails to do so, and receives a hand-delivered notice of such failure and the requirement to withhold and pay over additional taxes, continued failure to comply constitutes a misdemeanor under § 7215. In each of these situations, the taxpayer subject to enhanced penalties has special duties prescribed by Congress.

comprehensible distinctions between lawful conduct, misdemeanors, and felonies in the tax enforcement system, Congress could not have intended the residual clause of § 7212(a) to abrogate that entire system. On the contrary, § 7212(a) was enacted alongside the other specifically-defined tax crimes and civil penalties in a comprehensive overhaul of the Internal Revenue Code in 1954. Pub. L. No. 83-591, 68A Stat. 855. It is nonsensical to imagine that Congress decided in one breath that willful failure to file tax returns would be a misdemeanor under § 7203, and in the next breath that the same conduct could constitute a felony under § 7212(a).

For § 7212(a) to make any sense at all in the context of the tax enforcement structure, it must be a specialized tool to combat interference with an identifiable enforcement activity as opposed to a catchall felony that prosecutors could charge as an alternative or supplement to every one of the specifically-defined tax crimes. The statute contains two parallel clauses: one that criminalizes interference with an identifiable IRS agent performing her duties, and one that criminalizes interference with an identifiable enforcement action "in any other way." There must be a nexus between the corrupt endeavor undertaken by the defendant and an identifiable enforcement activity of which the defendant was aware.

Interpreting other obstruction statutes, this Court has consistently required a nexus between the defendant's conduct and a particular proceeding. Interpreting the predecessor to § 1503, the Court required the government to prove not just that the defendant's actions hindered law enforcement

generally, but that the defendant intended to hinder a pending judicial proceeding. *Pettibone v. United States*, 148 U.S. 197, 206 (1893). As explained by the Court, "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." *Id.* The Court subsequently clarified that requirement in *United States v. Aguilar*, 515 U.S. 595 (1995), finding that the defendant's "act must have a relationship in time, causation, or logic with the judicial proceedings." *Id.* at 599 (citing *United States v. Wood*, 6 F.3d 692 (10th Cir. 1993); *United States v. Walasek*, 527 F.2d 676, 679 & n.12 (3d Cir. 1975)). As in *Pettibone*, the *Aguilar* court found that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* at 599. *See also Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (requiring a nexus between persuasion to destroy documents and a "particular official proceeding").

To avoid subsuming the specific tax crimes Congress enacted simultaneously with § 7212(a), and to acknowledge that a taxpayer cannot intend to obstruct tax enforcement activity he knows nothing about, it is necessary to interpret the residual clause as applying to a particular enforcement activity of which the defendant had knowledge at the time of the allegedly impeding conduct.[4]

---

[4] In *Miner*, the Sixth Circuit attempted to reconcile its prior decisions in *Kassouf* and *Bowman*, noting that the *(cont'd)*

C. *§ 7212(a) Must Require Knowledge of Illegality and an Affirmative Act.*

1. *Requiring Knowledge of Illegality as an Element of a Tax Crime is Necessary to Preserve Due Process.*

This Court has repeatedly recognized that the complexity of the tax laws justifies a departure from the *mens rea* standard that is sufficient for other crimes. In the seminal case of *Cheek v. United States*, 498 U.S. 192 (1991), the Court explained:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. . . .

(cont'd from previous page)
defendant in *Bowman* was "attempting to instigate a frivolous IRS proceeding rather than to impede a preexisting one." *United States v. Miner*, 774 F.3d 336, 344 (2014). This effort to attempt to reconcile the decisions would not have been necessary had the *Bowman* court instead considered the proper role of § 7212(a) in the tax enforcement system; the defendant in *Bowman* was convicted of a felony under § 7206(1) for willfully filing false documents with the IRS, so the additional charge under § 7212(a) was not necessary to punish the defendant for the very acts on which the Sixth Circuit upheld that charge.

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

Id. at 199-200 (citing *United States v. Smith*, 5 Wheat. 153, 182 (1820) (Livingston, J., dissenting)); *Barlow v. United States*, 7 Pet. 404, 411 (1833); *Reynolds v. United States*, 98 U.S. 145, 167 (1879); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); and O. Holmes, The Common Law 47-48 (1881)); *see also United States v. Bishop*, 412 U.S. 346, 360-61 (1973) (requiring knowledge of illegality because "[i]n our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law [and] it is not the purpose of the law to penalize frank difference of opinion or innocent errors." (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943))).

The reasons this Court has articulated for reading the term "willfully" to require knowledge of

illegality in the criminal tax context apply equally to the term "corruptly" in § 7212(a). The lower courts have expressed reluctance "to add the word 'willfully' to section 7212(a), where Congress has seen fit to omit it," *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998), but that misses the point. There is no statutory definition of "willfully" or "corruptly" in Title 26. Rather, the understanding that the term "willfully" connotes a voluntary, intentional violation of a known legal duty arose out of this Court's jurisprudence "due to the complexity of the tax laws." *Cheek*, 498 U.S. at 200. There is nothing in § 7212(a) that lessens the complexity of the tax laws or justifies a departure from this Court's long-established precedent that a person can only be guilty of a tax crime if the Government can prove that the law imposed a duty on the defendant *and* the defendant knew of that duty.

As described above, the standard definition of "corruptly" adopted by the lower courts is to "act with the intent to gain an *unlawful* advantage or benefit either for oneself or for another." *United States v. Williamson*, 746 F.3d 987, 990 (10th Cir. 2014). No circuit court has decided whether proof that the advantage or benefit was unlawful is sufficient, or whether the Government must prove that the defendant knew that the advantage or benefit was unlawful. The Court of Appeals for the Tenth Circuit has twice elected to avoid the question of "whether a conviction under § 7212(a) requires that the defendant knew that the advantage or benefit sought was unlawful," *Sorensen*, 801 F.3d 1217, 1229 (10th Cir. 2015) (quoting *Williamson*, 746 F.3d 992), finding instead in *Williamson* that any

error in the jury instruction was not "plain," and in *Sorenson* that the enhanced jury instruction given in that case did incorporate a knowledge of illegality requirement. *Williamson*, 746 F.3d at 991-93; *Sorensen*, 801 F.3d at 1230 (approving instruction that to act corruptly, the defendant must have acted "knowingly and dishonestly, with the specific intent to gain an unlawful advantage or benefit either for oneself or for another by subverting or undermining the due administration of the internal revenue laws."); *see also United States v. Dean*, 487 F.3d 840, 853 (11th Cir. 2007) (noting that the pattern jury instruction for that circuit includes the "knowingly and dishonestly" language in the definition of corruptly); *United States v. Saldana*, 427 F.3d 298, 303 (5th Cir. 2005); *Kelly*, 147 F.3d at 176-77.

As it stands, there is no uniformly applied requirement that the Government prove knowledge of illegality to convict a defendant of a tax felony under § 7212(a) even though knowledge of illegality is required for every other federal tax crime. The College is concerned that lack of uniformity among the lower courts in defining a key element of a federal felony opens the door to abuse of prosecutorial discretion. The College, therefore, implores this Court to recognize that § 7212(a)—like every other tax crime—requires knowledge of illegality.

2. *§ 7212(a) Should Not be an Exception to the Rule that Tax Felonies Require an Affirmative Act.*

Requiring an affirmative act for a violation of § 7212(a) is necessary to provide fair notice of what conduct constitutes a felony. As described above, the *Spies* Court distinguished the tax misdemeanors from felony evasion by finding that use of the word "attempt" in the felony required an affirmative act. *Spies*, 317 U.S. at 498-99. In addition, the Court found that "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the same dereliction it had just defined . . . as a misdemeanor." *Id.* at 497. This Court should follow the lead of the *Spies* Court in finding that use of the word "endeavor" in § 7212(a) requires an affirmative act, and that conduct specifically described as a misdemeanor elsewhere in the Code is not a corrupt endeavor sufficient to support a conviction under § 7212(a).

In the decision below, the Second Circuit found that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration" of the code under § 7212(a). *United States v. Marinello*, 839 F.2d 209, 225 (2d Cir. 2016). To support that conclusion, it explained that "surely a defendant could be charged under section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide a proper accounting of business income and expenses." Ironically, the court "recognize[d] that the scope of omissions on which an omnibus clause violation

could be based is not limitless," and then cited *United States v. Wood*, 384 F. App'x 698, 708 (10th Cir. 2010), for the suggestion that "it is a 'questionable proposition' that a defendant's mere failure to file tax returns could constitute a violation of the omnibus clause, particularly because the 'willful failure to file tax returns is addressed in a different section of the Internal Revenue Code, 26 U.S.C. § 7203.'" *Marinello*, 839 F.3d at 225 n.15. Congress, however, designated willful failure to "keep any records, or supply any information" to the IRS—the exact conduct the *Marinello* court found could "surely" be charged as a felony under § 7212(a)—a misdemeanor under § 7203.

In *Wood*, the court found that the defendant "made a plausible argument" that there was plain error in the instructions to the jury because: (1) the willful failure to file tax returns is addressed in a different section of the Code, (2) the government "identified no language in the Code suggesting that the same conduct constituting a violation of § 7203 (a misdemeanor) may also constitute a violation of § 7212 (a felony)," and (3) the government provided no authority supporting the theory that "the failure to file under § 7203 can constitute[ ] a 'corrupt[ ] endeavor'" under § 7212. *Id.* (first alteration added). The court in *Wood*, however, did not decide whether an omission covered by § 7203 could constitute an endeavor for purposes of § 7212 because it found, instead, that the defendant was unable to show that the potential error was prejudicial when there was strong evidence that the defendant engaged in the other means of obstruction charged by the government. *Id.* at 709-10.

Marinello's conviction highlights the dangers of allowing prosecutors to charge omissions as felonies under § 7212(a). Marinello was charged and convicted of the misdemeanors he committed. But the jury was instructed that it could also convict him of felony obstruction in violation of § 7212(a) "on the grounds, variously, that Marinello did not keep adequate records; that, having kept them, he destroyed them; or that, having kept and preserved them from destruction, he failed to give them to his accountant." *United States v. Marinello*, 855 F.3d 455, 456 (2d Cir. 2017) (Jacobs, J., dissenting). Congress defined failure to keep records as a misdemeanor, but the court below found that failure alone was sufficient for the jury to convict Marinello of a felony.

Felony obstruction under § 7212(a) should require more than one of the failures to act that Congress categorized as misdemeanors. If Congress's use of the word "attempt" in describing tax evasion is sufficient to require an affirmative act, surely the word "endeavor" in § 7212(a) fulfills the same purpose.

D. *Any Broader Reading of § 7212(a) Threatens to Undermine the Tax Enforcement System.*

Uniformity, predictability, and comprehensibility are important anchors at the foundation of the tax enforcement system. As the Department of Justice has recognized:

> The Government helps to preserve the integrity of this Nation's self-assessment tax system through vigorous and uniform criminal

> enforcement of the internal revenue laws. Criminal prosecutions punish tax law violators and deter other persons who would violate those laws. To achieve maximum deterrence, the Government must pursue broad, balanced, and uniform criminal tax enforcement. Uniformity in tax cases is necessary because tax enforcement potentially affects more individuals than any other area of criminal enforcement. Broad and balanced enforcement is essential to effectively deter persons of varying economic and vocational status, violators in different geographic areas, and different types of tax law violations.

U.S. Dep't of Justice, *Criminal Tax Manual* § 2.00 (2012), https://www.justice.gov/sites/default/files/tax/legacy/2015/03/27/CTM%20Chapter%202.pdf (incorporating U.S. Attorneys' Manual 6-4.010.) Effective tax enforcement relies on deterrence, and deterrence relies on uniform application of comprehensible distinctions between lawful conduct and criminal behavior. A broad reading of the residual clause in § 7212(a) defeats congressional intent by impeding, rather than promoting, deterrence.

The Government's sweeping interpretation of § 7212(a) criminalizes such a vast array of conduct that it makes enforcement purely a matter of prosecutorial whim. By reading out of the statute any requirement that one be aware of an IRS proceeding, or that the taxpayer (or his lawyer) have undertaken a single affirmative act, the decision below allows prosecutors to look back with hindsight to identify any past omission that may have had the

effect of securing an advantage for the taxpayer, and use that omission to extend the criminal net. When prosecutors have such unrestrained authority to make law through their enforcement choices, the inevitable result is at least the perception—if not the reality—of selective, arbitrary prosecution. This arbitrariness lessens the perceived legitimacy of the tax laws, and leads to increased violations rather than compliance. *See* Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. Rev. Online 152 (2015) (arguing that overcriminalization increases the commission of criminal acts because it facilitates the most prevalent and powerful rationalizations used by would-be offenders).

The purpose of criminal tax enforcement is to preserve the integrity of the comprehensive tax system Congress enacted. A broad reading of § 7212(a) thwarts that purpose by impermissibly shifting the power to define criminal liability to prosecutors. That shift not only violates the Due Process clause, but undermines the integrity of the tax enforcement system.

CONCLUSION

For the foregoing reasons, the College respectfully encourages the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

ARMANDO GOMEZ
DAVID W. FOSTER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
202-371-7000

JENNY L. JOHNSON
Counsel of Record
GUINEVERE M. MOORE
JOHNSON MOORE LLC
150 North Wacker Drive
Suite 1250
Chicago, IL 60606
312-549-9990
Jenny.johnson@
jmtaxlitigation.com

Attorneys for Amicus Curiae

Dated: September 8, 2017

RECORD AND BRIEFS

No. 16-1144

Supreme Court, U.S.
FILED
SEP - 8 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CARLO J. MARINELLO, II,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

JOSHUA L. DRATEL
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W.
Washington, D.C. 20036
(202) 872-8600

JOHN VECCHIONE
ERICA L. MARSHALL*
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
erica.marshall@causeofaction.org

**Counsel of Record*

Counsel for Amici Curiae

September 8, 2017

275467

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 6

ARGUMENT 8

I. This Court has routinely cabined broadly-drafted criminal statutes that are vague or lack meaningful *mens rea* requirements 8

A. The omnibus clause raises vagueness concerns 9

B. The government's interpretation of the omnibus clause invites its arbitrary enforcement 12

II. The "corruptly" *mens rea* requirement does not protect the statute from vagueness concerns or constitute a meaningful *mens rea* requirement 20

Table of Contents

Page

A. Whether the defendant had the "intent to obtain an unlawful benefit" depends on whether the benefit was unlawful, not on whether the defendant *knew* the benefit was unlawful 22

B. Even legal acts or omissions can be criminal 23

C. The "unlawful benefit" does not need to be a tax benefit 25

D. The act or omission need not even actually obstruct or impede the administration of the tax code or be carried out with the intent to obstruct or impede the administration of the tax code 27

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

CASES

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) ..... *passim*

Bell v. United States,
349 U.S. 81 (1955) 12

Cheek v. United States,
498 U.S. 192 (1991) 18

DeCoster v. United States,
No. 16-877 (2017) 2

Elonis v. United States,
135 S. Ct. 2001 (2015) 22

Fed. Commc'ns Comm'n v.
Fox Television Stations, Inc.,
567 U.S. 239 (2012) 8

Gonzales v. Carhart,
550 U.S. 124 (2007) 22

Grayned v. City of Rockford,
408 U.S. 104 (1972) 8

Johnson v. United States,
135 S. Ct. 2551 (2015) 8

Cited Authorities

Page

Kolender v. Lawson,
461 U.S. 352 (1983) 8

Liparota v. United States,
471 U.S. 419 (1985) 12, 18

Marinello v. United States,
137 S. Ct. 2327 (Mem), 85 U.S.L.W. 3602
(U.S. June 27, 2017) 7

McCutcheon v. Fed. Election Comm'n,
134 S. Ct. 1434 (2014) 1

McDonnell v. United States,
136 S. Ct. 2355 (2016) 4, 8

McNally v. United States,
483 U.S. 350 (1987) 10, 11

Morissette v. United States,
342 U.S. 246 (1952) 18

Morrison v. Olson,
487 U.S. 654 (1988) 10

Overton v. United States,
No. 15-1504 (2017) 2

Ratzlaf v. United States,
510 U.S. 135 (1994) 18

Cited Authorities

Page

Rewis v. United States,
401 U.S. 808 (1971) 12

Shushan v. United States,
117 F.2d 110 (5th Cir. 1941) 11

Skilling v. United States,
561 U.S. 358 (2010) 11

Staples v. United States,
511 U.S. 600 (1994) 18

U.S. Civil Serv. Comm'n v. Nat'l Ass'n Letter Carriers, AFL-CIO,
413 U.S. 548 (1973) 10

United States v. Aguilar,
515 U.S. 593 (1995) 4, 10, 18, 28

United States v. Allison,
264 Fed. App'x 450 (5th Cir. 2008) 26-27

United States v. Armstrong,
974 F. Supp. 528 (E.D. Va. 1997) 16, 24

United States v. Bezmalinovic,
No. S3-96-CR-97, 1996 U.S. Dist. LEXIS 18976
(S.D.N.Y. Dec. 26, 1996) 24

Cited Authorities

Page

United States v. Biller,
No. 06-CR-14, 2007 U.S. Dist. LEXIS 7156
(N.D. W. Va. Jan. 31, 2007) 16, 24

United States v. Black,
No. CR 12-0002 (N.D. Cal.).....2

United States v. Blake,
No. 12-CR-104, 2014 U.S. Dist. LEXIS 136049
(E.D. Tenn. Sept. 26, 2014) 3

United States v. Bostian,
59 F.3d 474 (4th Cir. 1995).....24

United States v. Bostian,
59 F.3d 474 (4th Cir. 1995).....19, 23

United States v. Bowman,
173 F.3d 595 (6th Cir. 1999).....25

United States v. Brennick,
908 F. Supp. 1004 (D. Mass. 1995) 21

United States v. Castaldi,
743 F.3d 589 (7th Cir. 2014).....3

United States v. Croteau,
No. 2:13-CR-121, 2014 U.S. Dist. LEXIS 170025
(M.D. Fla. Dec. 9, 2014).....3

Cited Authorities

Page

United States v. Daugerdas,
No. S3-09-Cr-581, 2011 U.S. Dist. LEXIS 14912
(S.D.N.Y. Feb. 7, 2011) 16

United States v. Dykstra,
991 F.2d 450 (8th Cir. 1993) 20

United States v. Floyd,
740 F.3d 22 (1st Cir. 2014) 3, 5, 27

United States v. Giambalvo,
810 F.3d 1086 (8th Cir. 2016) 25, 27

United States v. Hanson,
2 F.3d 942 (9th Cir. 1993) 21

United States v. Henderson,
386 F. Supp. 1048 (S.D.N.Y. 1974) 3, 13

United States v. Herder,
551 Fed. App'x 257 (6th Cir. 2014) 3

United States v. Johnson,
571 Fed. App'x 205 (4th Cir. 2014) 3

United States v. Kahre,
No. 05-CR-121, 2009 U.S. Dist. LEXIS 39473
(D. Nev. Apr. 20, 2009) 23

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998) 7, 29

Cited Authorities

Page

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998) 5, 21

United States v. Kozak,
No. 12-CR-344, 2014 U.S. Dist. LEXIS 40983
(D.Neb. Feb. 7, 2014) 3

United States v. Madoch,
108 F.3d 761 (7th Cir. 1997) 19

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) ..... *passim*

United States v. Martin,
747 F.2d 1404 (11th Cir. 1984) 20

United States v. Massey,
419 F.3d 1008 (9th Cir. 2005) 5

United States v. Mathis,
No. CR-1-97-15, 1997 U.S. Dist. LEXIS 24049
(S.D. Ohio June 2, 1997) 17

United States v. McBride,
362 F.3d 360 (6th Cir. 2004) 19

United States v. Miner,
774 F.3d 336 (6th Cir. 2014) 3, 7

Cited Authorities

Page

United States v. Mitchell,
985 F.2d 1275 (4th Cir. 1993) 15

United States v. Moleski,
No. 12-CR-811, 2014 U.S. Dist. LEXIS 3905
(D. N.J. Jan. 13, 2014) 3

United States v. Ogbazion,
No. 15-CR-104, 2016 U.S. Dist. LEXIS 143358
(S.D. Ohio Oct. 17, 2016) 29

United States v. Popkin,
943 F.2d 1535 (11th Cir. 1991) ..... *passim*

United States v. Reeves,
752 F.2d 995 (5th Cir. 1985) 21

United States v. Saldana,
427 F.3d 298 (5th Cir. 2005) 5, 21, 25

United States v. Saoud,
595 Fed. App'x 182 (4th Cir. 2014) 3

United States v. Sorenson,
801 F.3d 1217 (10th Cir. 2015) ..... *passim*

United States v. Sun-Diamond Growers,
526 U.S. 398 (1999) 4

Cited Authorities

Page

United States v. Taylor,
550 Fed. App'x 135 (3d Cir. 2014) 3

United States v. Toliver,
972 F. Supp. 1030 (W.D. Va. 1997) 16

United States v. Trimble,
12 F. Supp. 3d 742 (E.D. Pa. 2014) 3

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978) 18

United States v. Valenti,
121 F.3d 327 (7th Cir. 1997) 19

United States v. Weiss,
754 F.3d 207 (4th Cir. 2014) 3

United States v. Williams,
644 F.2d 696 (8th Cir. 1981) 3, 12

United States v. Williamson,
746 F.3d 987 (10th Cir. 2014) 5

United States v. Willner,
No. 07-CR-183, 2007 U.S. Dist. LEXIS 75597
(S.D.N.Y. Oct. 11, 2007) 17

United States v. Wilson,
118 F.3d 228 (4th Cir. 1997) 21, 23

Page

United States v. Wood,
384 Fed. App'x 698 (10th Cir. 2010) 17

United States v. Workinger,
90 F.3d 1409 (9th Cir. 1996) 19

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 18

United States v. Yagow,
953 F.2d 423 (8th Cir. 1992) 26

Yates v. United States,
135 S. Ct. 1074 (2015) 2, 4, 11, 12

STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. V 8

18 U.S.C. § 1346 11

26 U.S.C. § 501 26

26 U.S.C. § 5801 26

26 U.S.C. § 7201 7

26 U.S.C. § 7203 17

Cited Authorities

Page

26 U.S.C. § 7206 16

26 U.S.C. § 7212 ..... 12, 16, 20, 27

26 U.S.C. § 7212(a) ..... *passim*

26 U.S.C. § 7701 21

26 U.S.C. § 9001 26

Attorney General Robert H. Jackson, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940) 10

CoA Institute, *About* 1

Dep't of Justice, Criminal Tax Manual § 3.00 (2004 ed.) 14

Dep't of Justice, Criminal Tax Manual § 17.02 (2001 ed.) 13, 20

Dep't of Justice, Criminal Tax Manual § 17.02 (2012 ed.) 14

Dep't of Justice, Criminal Tax Manual § 17.04(1) (2012 ed.) 19

Dep't of Justice, Criminal Tax Manual § 17.04(2) (2012 ed.) 15, 19

Page

Dep't of Justice, Criminal Tax Manual §§ 3-29–3-30 (1988 ed.) 13

Dep't of Justice Tax Division Directive No. 77 (July 7, 1989) 13

John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L. J. 255 (2009) 14

Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643 (Winter 2006) 23

Kathryn Kenealy, *Column: White Collar Crime*, 21 Champion 25 (1997) 13, 26

Supreme Court Rule 37.3 1

U.S. Att'ys Manual § 6-4.211 (1988) 13

Pursuant to Supreme Court Rule 37.3, Cause of Action Institute ("CoA Institute") and National Association of Criminal Defense Lawyers ("NACDL") respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICI CURIAE*

Amicus curiae CoA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g., McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute's *amicus* brief).

CoA Institute has a particular interest in challenging government overreach in the criminal justice system, protecting the rule of law, and working to combat the criminalization of conduct that can be addressed through existing civil law—*i.e.*, the process of "overcriminalization." In order to fulfill this mission, CoA Institute has represented criminal defendants in federal court, *e.g.*,

---

1. In accordance with Supreme Court Rule 37.3, CoA Institute notified the counsel of record for all parties and all parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute and NACDL financially contributed to preparing this brief.

2. CoA Institute, *About*, http://www.causeofaction.org/about (last visited Sept. 8, 2017).

United States v. Black, No. CR 12-0002 (N.D. Cal.), appeared as *amicus curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), and appeared as *amicus curiae* in other criminal matters before this Court. *See, e.g.*, *DeCoster v. United States*, No. 16-877 (2017); *Overton v. United States*, No. 15-1504 (2017).

Amicus curiae NACDL is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has an interest in ensuring the fair and just development of basic criminal law principles, including limits on prosecutorial discretion and upholding *mens rea* requirements. NACDL believes that this case presents an appropriate vehicle for the Court to clarify the prosecutorial limits and *mens rea* requirements of the "omnibus clause" of 26 U.S.C. § 7212(a).

SUMMARY OF ARGUMENT

Tucked away in the text of a statute punishing those who use force or threats to intimidate or impede Internal Revenue Service ("IRS") agents, is what has become known as the "omnibus clause"—words that, when strung together, punish "[w]hoever . . . corruptly . . . obstructs or impedes . . . or endeavors to obstruct or impede . . . the due administration of [the tax code]." 26 U.S.C. § 7212(a).

For nearly three decades after the statute's passage this clause languished unused, with the first reported appellate decision invoking it not appearing until 1981. *United States v. Williams*, 644 F.2d 696, 701 (8th Cir. 1981). Prior to that case, the government had actually taken the position that "thus far all prosecutions [under 26 U.S.C. § 7212] have involved the use of force, violence or threats" because "the legislative history of section 7212 indicates that its purpose was to prevent intimidation or impeding of Internal Revenue Service agents by force or threats of force." *United States v. Henderson*, 386 F. Supp. 1048, 1056 (S.D.N.Y. 1974).

Now, the omnibus clause, a felony containing a lower "corruptly" *mens rea* requirement than the "willful" violations required of most tax code misdemeanors, and a possible three-year sentence, is routinely added to prosecutions under Title 26. In 2014, alone, the omnibus clause was the debate of at least thirteen reported cases, a number that does not include countless other indictments that were filed that same year.[3] Its current prominence is

3. *See, e.g.*, *United States v. Floyd*, 740 F.3d 22 (1st Cir. 2014); *United States v. Taylor*, 550 Fed. App'x. 135 (3d Cir. 2014); *United States v. Saoud*, 595 Fed. App'x. 182 (4th Cir. 2014); *United States v. Weiss*, 754 F.3d 207 (4th Cir. 2014); *United States v. Johnson*, 571 Fed. App'x. 205 (4th Cir. 2014); *United States v. Herder*, 551 Fed. App'x. 257 (6th Cir. 2014); *United States v. Miner*, 774 F.3d 336 (6th Cir. 2014); *United States v. Castaldi*, 743 F.3d 589 (7th Cir. 2014); *United States v. Trimble*, 12 F. Supp. 3d 742 (E.D.Pa. 2014); *United States v. Croteau*, No. 2:13-CR-121, 2014 U.S. Dist. LEXIS 170025 (M.D.Fla. Dec. 9, 2014); *United States v. Blake*, No. 12-CR-104, 2014 U.S. Dist. LEXIS 136049 (E.D.Tenn. Sept. 26, 2014); *United States v. Kozak*, No. 12-CR-344, 2014 U.S. Dist. LEXIS 40983 (D.Neb. Feb. 7, 2014); *United States v. Moleski*, No. 12-CR-811, 2014 U.S. Dist. LEXIS 3905 (D.N.J. Jan. 13, 2014).

unsurprising as the majority interpretation of the statute covers such a broad swath of conduct that even many specifically-enumerated criminal offenses within the tax code could constitute obstruction.

In this case, failure to provide an accountant with documents, throwing away receipts, and cashing business checks were just a few of the routine actions considered to qualify as obstruction of the tax code, even though Mr. Marinello had no knowledge of the future investigation the IRS would undertake at the time of his purportedly criminal action. Pet. App. 4a, 15a.

This Court has routinely cabined criminal statutes within their proper textual context where the outer bounds of statutory interpretation threaten vagueness and fail to provide fair notice to ensure that everyone indicted under a statute knows he was violating the law. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2367 (2016); *Yates*, 135 S. Ct. at 1074; *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Aguilar*, 515 U.S. 593 (1995). These *mens rea* requirements are essential to our criminal law jurisprudence. As such, this Court has never left the outer bounds of a statute up to prosecutorial discretion. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 408, 412 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions). The omnibus clause, as applied in a majority of the circuits, runs counter to these blackletter principles. It should join the list of statutory clauses properly cabined by this Court.

As currently interpreted in the First, Second, Ninth, and Tenth Circuits, any act or omission done "corruptly"

that impeded the IRS's ability to administer the tax code, at any point, constitutes obstruction of the tax code, regardless of whether the defendant knew there was any investigation or specific IRS action pertaining to that individual. *See United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016); *United States v. Sorenson*, 801 F.3d 1217, 1225–26 (10th Cir. 2015); *Floyd*, 740 F.3d at 32; *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005).

Respondent asserts the administration of the tax code is "continuous, ubiquitous, and universally known to exist," and that every person is on notice that the government is always executing the tax code. *See* Gov't Br. in Opp'n to Pet. for Cert. ("BIO") at 9. Yet, it nonetheless argues that any constitutional vagueness concerns are assuaged by the *mens rea* requirement in the statute, meaning that the defendant acted "corruptly." BIO at 11. Circuit courts have also taken false comfort in the bounds placed on the omnibus clause by the requirement that the defendant have acted "corruptly."

As a practical matter, this *mens rea* requirement does little to cure vagueness concerns or restrict the omnibus clause's application. To act "corruptly" is to act "with intent to gain an unlawful advantage or benefit for oneself or for another." *Sorenson*, 801 F.3d at 1225 (citing *United States v. Williamson*, 746 F.3d 987, 992 (10th Cir. 2014)); *see, e.g.*, *United States v. Saldana*, 427 F.3d 298, 305 (5th Cir. 2005); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Popkin*, 943 F.2d 1535, 1539–40 (11th Cir. 1991).

As currently interpreted, the omnibus clause applies regardless of whether the defendant knew his act or

omission was obstructing the IRS, regardless of whether that act or omission actually did obstruct the IRS in its administration of the tax code, regardless of whether the defendant knew the benefit he ultimately obtained was unlawful, and regardless of whether the act or omission is otherwise completely legal. Importantly, because the definition of "corruptly" requires only that the defendant acted to obtain an unlawful benefit, and the courts have held that the obstruction of the IRS's administration of the tax code can be at some point in the future, the government does not even need to prove that the defendant actually knew he was obstructing the IRS when he performed the complained-of act or omission.

This Court should adopt the reading of the statute supported by Petitioner and cabin the omnibus clause to the context of the statute within which it lies—one directed at punishing those who use force, threats, or corrupt actions to obstruct specific IRS officials or known IRS investigations. The position adopted by Petitioner is backed not only by the text of the statute but also by years of jurisprudence from this court limiting the application of criminal statutes in order to avoid vagueness and ensure meaningful *mens rea* requirements.

STATEMENT OF THE CASE

In *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016), the United States obtained an indictment against Mr. Carlo J. Marinello, II, under 26 U.S.C. § 7212(a)'s "omnibus clause" of the criminal portion of the tax code, which, in relevant part, makes it a felony to "in any other way corruptly . . . obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of [Title 26]."

Pet. App. 6a–7a. Although the tax code expressly sets forth numerous felonies, and requires the government to prove that the defendant "willfully" violated those statutes, *see, e.g.*, 26 U.S.C. § 7201 *et seq.*, the government argued, and the Second Circuit agreed, that Mr. Marinello could be guilty of the felony of corruptly obstructing or impeding the administration of the tax code by performing acts as common as "failing to maintain corporate books and records for . . . his small business," "failing to provide [his] accountant with complete . . . information related to [his] personal income," and "discarding business records" because he performed these acts and omissions with the intent to obtain an unlawful benefit—not paying taxes. *See* Pet. App. 6a–7a, 32a–35a.

The Second Circuit declined to adopt the holding in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), as affirmed in *United States v. Miner*, 774 F.3d 336 (6th Cir. 2014), which would have required the government to prove that the defendant took action to impede or obstruct a pending IRS action in order to obtain a conviction under the omnibus clause. Pet. App. 23a–25a. Rejecting the Sixth Circuit's concerns of vagueness and overbreadth, the Second Circuit stated that the term "corruptly" sufficiently restricts the reach of the omnibus clause. Pet. App. 27a. Mr. Marinello filed a Petition for a Writ of Certiorari from the Second Circuit, which this Court granted. *Marinello v. United States*, 137 S.Ct. 2327 (Mem), 85 U.S.L.W. 3602 (U.S. June 27, 2017) (No. 16-1144).

ARGUMENT

1. This Court has routinely cabined broadly-drafted criminal statutes that are vague or lack meaningful *mens rea* requirements.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)). The fair notice requirement extends to both criminal and civil cases. *See, e.g., Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). It ensures that Congress speaks clearly when proscribing conduct, so that police, prosecutors, judges, and juries are not impermissibly delegated lawmaking authority to be supplied on an *ad hoc* and subjective basis. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

In *McDonnell v. United States*, this Court rejected an argument similar to the one the government is making here, that "'Congress used intentionally broad language'" in defining an "official act" in the bribery statute. 136 S. Ct. at 2367 (internal citation omitted). Rather, making a reference to the "standardless sweep" of the government's broad reading, this Court held that the government's expansive interpretation of "official act" failed to provide fair notice about the conduct proscribed and would encourage arbitrary and discriminatory enforcement. *Id.* at 2373.

Here, too, the government's request for a broad reading of the omnibus clause would place the statute on constitutionally-infirm ground. For this reason, the Court should adopt the interpretation urged by the Petitioner.

A. The omnibus clause raises vagueness concerns.

The government's interpretation of the omnibus clause does not give ordinary people fair notice of what conduct is actually illegal. Here, conduct as common as throwing away receipts, failing to keep books and records, failing to give an accountant "complete" information, "cashing business checks," and using business receipts to pay personal expenses were deemed by the government, and found by a jury, to obstruct or impede the IRS's "due administration" of the tax code. *See* Pet. App. 6a–7a.

The question for this Court is whether the average taxpayer would know that *not* doing something—like *not* giving their accountant a record showing their recent $200 profit from an eBay sale of their old record collection—was felony obstruction of the IRS's administration of the tax code. Certainly, the taxpayer might know that this $200 is probably revenue and that he should probably report it to his accountant. And in this scenario, the failure to send this income to his accountant would, at least plausibly, impede the IRS's ability to levy and collect taxes on that money in the future. But this is the constitutional weakness with the proffered interpretation by the government—it doesn't actually require that the taxpayer know, for instance, that not reporting $200 to his accountant would then or later obstruct or impede any IRS agent's "administration of the tax code" in a manner that could constitute a felony.

This was particularly the concern of the dissent below, that the broad interpretation and application of the statute would allow any prosecutor to say "[s]how me the man, and I'll find you the crime." Pet. App. 49a; *see also Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting) (quoting Attorney General Robert H. Jackson, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)).

This Court must, if it can, construe an Act of Congress so as to preserve it, rather than invalidate it as unconstitutionally vague. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973). Thus, this Court has routinely exercised its authority to narrowly construe a statute in order to avoid vagueness problems associated with an overly expansive interpretation. The most analogous example is this Court's interpretation of the similarly-worded obstruction of justice statute. *Aguilar*, 515 U.S. at 599–600 (interpreting the obstruction of justice "omnibus clause" to require a nexus in time, causation, or logic with a judicial proceeding, such that the defendant must have acted with an intent to influence a known judicial or grand jury proceeding). But other examples abound.

In *McNally v. United States*, for example, this Court curtailed the use of the mail and wire fraud statute to prosecute cases where the mail or wires were used to deprive the public of "intangible rights." 483 U.S. 350, 360 (1987).[4] When Congress responded by amending the

4. Prior to this holding, courts of appeals had interpreted the mail-fraud statute's prohibition of "any scheme or artifice to defraud" to include deprivations of not only money or property,

code to state that the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services, 18 U.S.C. § 1346, this Court again stepped in to interpret the statute to avoid vagueness. *Skilling v. United States*, 561 U.S. 358, 402-03 (2010). The Court limited the honest services fraud statute to classic bribery and kickback schemes that made up the bulk of the pre-*McNally* case law, but prohibited a more expansive reading of the statute. *Id.* at 408–09 (stating that "[r]eading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise due process concerns underlying the vagueness doctrine" and holding "that § 1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law"); *see also Arthur Andersen LLP*, 544 U.S. at 703 (overturning the conviction of the corporation where the government failed to prove the company knowingly broke the law or acted to obstruct a specific proceeding when it continued to implement its routine document destruction policy and cautioning that this Court has traditionally exercised restraint in assessing the reach of federal criminal statutes).

Similarly, in *Yates v. United States*, this Court invoked the rule of lenity and noted that the doctrine

---

but also of intangible rights. *See, e.g., Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941). These holdings created the "honest services" doctrine, which eventually resulted prosecutions for the use of the mail system in depriving tax payers, and eventually even corporations, of an employee or official's "honest services." In *McNally*, this Court narrowly interpreted the mail fraud statute as "limited in scope to the protection of property rights," 483 U.S. at 360, and expressly stated that "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.*

was particularly relevant where the government urged a "reading of [18 U.S.C.] § 1519 that exposes individuals to 20-year prison sentences for tampering with any physical object that might have evidentiary value in any federal investigation into any offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil." 135 S.Ct. at 1088 (citing *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning[.]")); *see Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)).

This Court's prior rulings require it to reject the government's argument for a broad reading of the statute here.

B. The government's interpretation of the omnibus clause invites its arbitrary enforcement.

Petitioner's position is simple and based in the text. The interpretation advanced by the government impedes clarity and uniform enforcement. Prior to 1981, Respondent took the position that the entire 26 U.S.C. § 7212 statute should only be used in cases where the defendant used physical force or threats of force against an IRS official. Indeed, the government even represented this position to the courts. *Williams*, 644 F.2d at 699 n.12 (in a case of first impression, discussing the government's prior position and stating that "[a]t one time the Government contended that § 7212 applied only to conduct involving force or threats of force," but that "the Government in the

present case has characterized its position in Henderson as 'timid.'") (citing *United States v. Henderson*, 386 F. Supp. 1048, 1055–56 (S.D.N.Y.1974)).

A review of the Department of Justice's ("DOJ") Criminal Tax Manual ("CTM") demonstrates the hodgepodge of varying positions the government has taken on when and how the omnibus clause should be used. A 1989 directive explicitly advised against bringing Section 7212(a) charges in garden variety tax evasion or false return cases, stating that: "[t]he omnibus clause should not be utilized when other more specific charges are available and adequately reflect the gravamen of the offense." Kathryn Kencally, *Column: White Collar Crime*, 21 Champion 25, 25 (1997) (citing Dep't of Justice Tax Division Directive No. 77 (July 7, 1989), Dep't of Justice, Criminal Tax Manual [hereinafter CTM] §§ 3-29–3-30 (1988 ed.)).

Indeed, for many years the DOJ Tax Division did not even have jurisdiction within the agency to prosecute crimes under section 7212(a). U.S. Att'ys Manual § 6-4.211 (1988), *available at* http://bit.ly/2xTfnAx (stating that "[t]he Assistant Attorney General, Tax Division, has responsibility for all criminal proceedings arising under the internal revenue laws except . . . corrupt or forcible interference with an officer or employee acting under the internal revenue laws (26 U.S.C. § 7212(a))").

In the 2001 version, the CTM stated that "the use of the 'omnibus' provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed—*typically conduct designed to impede or obstruct an audit or criminal tax investigation*. CTM § 17.02 (2001 ed.), *available at* http://coainst.org/2epqSqQ.

In the 2004 edition of the CTM, the DOJ Tax Division expanded the scope of recommended use to prosecute "large-scale obstructive conduct involving the tax liability of third parties," even occurring pre-investigation. *Sorensen*, 801 F.3d at 1227 (citing CTM § 3.00 (2004 ed.)) and stating that the Tax Division advised its personnel that a charge under § 7212(a)'s omnibus clause would be "particularly appropriate" for "corrupt conduct that is intended to impede an IRS audit or investigation" and "[could] also be authorized" for "large-scale obstructive conduct involving the tax liability of third parties," even occurring pre-audit or pre-investigation). Neither of these enforcement policies effective in 2001 and 2004, if followed, would have included the offense charged under the omnibus clause in this case.

The language restricting the omnibus clause to conduct designed to impede an audit or investigation was eventually removed from the CTM altogether. *See* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L. J. 255, 302 (2009). The current version of the CTM reflects the unbounded interpretation offered by Respondent. By the recommendation in the current version of the CTM, "[s]ection 7212(a) applies broadly to the variety of conduct used to attempt to prevent the IRS from carrying out its lawful functions" and applies to any defendant seeking "to avoid the proper assessment and payment of taxes." CTM § 17.02 (2012 ed.), *available at* http://bit.ly/2vPiiIa.

Even while the CTM cautioned federal prosecutors to constrain the use and expanse of the omnibus obstruction statute, the government succeeded in convincing courts that the application of the statute was almost boundless.

Indeed, contrary to admonitions from this Court, lower courts have expressly interpreted the omnibus clause *broadly*. *See Sorenson*, 801 F.3d at 1225–26 ("[W]e have cited favorably other cases broadly interpreting § 7212(a)'s omnibus clause."); *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) ("[T]he inclusion of the omnibus 'in any other way' and 'the due administration of this title' language encourage a broad rather than narrow construction.") (internal citation omitted); *Popkin*, 943 F.2d at 1538.

And with this broad interpretation have come inconsistencies in the manner in which the statute is applied. Under the analysis proffered by the government, a misdemeanor offense of willfully failing file a return (for which Mr. Marinello was also found guilty) could also be the very act or omission constituting obstruction of the due administration of the tax code. Certainly, it is hard to imagine any willful failure to file a tax return that would not also hinder the IRS's ability to levy taxes and otherwise administer the tax code.

The government challenges this assertion as being "doubted" by the Second Circuit, BIO at 13, and refers this Court to the 2012 CTM, which highlights the DOJ's "policy" to charge failures to file tax returns as standalone offenses and not as obstructive acts. BIO at 13 (citing CTM § 17.04(2) (2012 ed.), *available at* http://bit.ly/2vPiiIa).

The government's position in this case highlights yet another instance in which the broad interpretation of the omnibus clause results in arbitrary enforcement before the lower courts. In fact, stand-alone tax offenses have already been charged as omnibus obstruction on numerous

occasions where those same stand-alone offenses were also charged as separate counts in the indictment. *See United States v. Biller*, No. 06-CR-14, 2007 U.S. Dist. LEXIS 7156, *29–30 (N.D. W. Va. Jan. 31, 2007) ("At trial, the Government proved beyond a reasonable doubt that Biller submitted false income tax returns for tax years 1999, 2000, 2001 and 2002. The Court finds that the filing of false income tax returns is one method by which Biller corruptly endeavored to obstruct or impede the due administration of the Internal Revenue Code."); *United States v. Armstrong*, 974 F. Supp. 528, 540 (E.D. Va. 1997)[5] ("While some of the charged acts in Count I may constitute independent criminal offenses, such as violations of § 7206(1), they are also corrupt acts that could impair or obstruct the administration of the tax laws."); *United States v. Toliver*, 972 F. Supp. 1030, 1037 (W.D. Va. 1997) (holding, in accordance with what the government argues here, that since a violation of 26 U.S.C. § 7206 requires proof that the defendant acted "willfully" and a violation of the omnibus clause under 26 U.S.C. § 7212 requires that the defendant have only acted "corruptly," the statutes have different elements and therefore it is not duplicative to charge 7206 violations as both stand-alone counts and obstructive acts under the omnibus clause); *see also United States v. Daugerdas*, No. S3-09-Cr-581, 2011 U.S. Dist. LEXIS 14912, at *5 (S.D.N.Y. Feb. 7, 2011) (holding that multiple tax charges against an individual may be the predicate for a single violation of the IRS obstruction statute).

---

5. In its opinion in this case below, the Second Circuit cited *United States v. Armstrong* approvingly for a different proposition. *Marinello*, 839 F.3d at 225 n.16.

And while charging the violation of a tax statute as the "corrupt act" that obstructed or impeded the IRS is readily accepted in the Fourth Circuit, such a theory has been rejected out of hand by other courts. *See United States v. Wood*, 384 Fed. App'x. 698 (10th Cir. 2010); *United States v. Mathis*, No. CR-1-97-15, 1997 U.S. Dist. LEXIS 24049 (S.D. Ohio June 2, 1997). Accordingly, while the government here agreed to remove the violation of 26 U.S.C. § 7203 from the indictment in order to avoid duplicity concerns, other defendants have not been so lucky. The threat of arbitrary enforcement under the government's interpretation of the statute is not theoretical, it already occurs within the circuits that have adopted the broad reading of the statute proffered by the government here. Even in the Second Circuit, lower courts have questioned the propriety of the interpretation offered by Respondent and which is now the law of the circuit. *United States v. Willner*, No. 07-CR-183, 2007 U.S. Dist. LEXIS 75597, at *14–17 (S.D.N.Y. Oct. 11, 2007) ("Although both sides purport to rely on the plain language of § 7212(a), that language plainly does not provide a clear answer. Were the Court writing on a clean slate, something could be said for an interpretation that read the 'administration' of the Internal Revenue Code as referring to specific IRS functions or proceedings.").

The inconsistency is even more profound when a prosecutor opts not to pursue a stand-alone offense and, instead, alleges the same conduct that could give rise to a stand-alone charge as conduct constituting obstruction.

As this Court ruled, "we must construe [an imprisonment] statute in light of the background rules of the common law in which the requirement of some *mens*

rea for a crime is firmly embedded." *Staples v. United States*, 511 U.S. 600, 605 (1994) (internal citation omitted); *see also Morissette v. United States*, 342 U.S. 246, 250–52 (1952). With a few exceptions, this Court has adopted a presumption in favor of construing criminal statutes to require proof of an evil state of mind. *See, e.g., Arthur Andersen LLP*, 544 U.S. at 705; *Aguilar*, 515 U.S. at 599; *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples*, 511 U.S. at 600; *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Cheek v. United States*, 498 U.S. 192 (1991); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978).

The *mens rea* requirements of most of the substantive offenses of the criminal tax code are exacting. Most of the substantive offenses in the tax code contain the requirement that the defendant have acted "willfully" to commit the accused crime. A "willful" violation occurs where the defendant actually knew the terms of the statute and that his conduct violated the statute. *Cheek*, 498 U.S. at 201. As the Supreme Court noted in *Cheek*, the tax law's complexity and potential for ensnaring the innocent require "the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 201, 205. The lower "corruptly" *mens rea* requirement of the omnibus clause presents prosecutors with an opportunity to charge conduct as "obstruction" without having to overcome the difficulty of proving any willful code violation.

The government's position does nothing to truly address this concern, that the omnibus clause swallows up and renders moot most other provisions of the criminal tax

code. Indeed, the current version of the CTM, published in 2012, lays out the endless possibilities for use of the omnibus clause by prosecutors. CTM § 17.04(2) (2012 ed.), *available at* http://bit.ly/2vPiiIa.

The CTM highlights that "[a]n endeavor may be corrupt even when it involves means that are not illegal in themselves," *id.* § 17.04(1); "the means by which a defendant can 'endeavor' to impede the due administration of the internal revenue laws are unlimited," *id.* § 17.04(2); "[t]he acts themselves need not be illegal," *id.* § 17.04(1); and, "[t]he defendant need not seek a financial benefit in order to satisfy the element of acting 'corruptly.'" *Id.*

Even in so stating, the bulk of the appellate cases referenced in the CTM necessarily involved, by the nature of the facts of each case, defendants who actually knew they were being audited or investigated by the IRS. *Id.* (collecting cases, most of which involved a defendant targeting a specific IRS agent or seeking to interfere with a specific collection action, auction of taxpayer property, or audit); *see United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004) (filing fraudulent petition to place IRS revenue agent assigned to girlfriend's case into involuntary bankruptcy); *United States v. Valenti*, 121 F.3d 327, 331–32 (7th Cir. 1997) (making statements designed to persuade witnesses not to talk to IRS employees or cooperate with an IRS investigation); *United States v. Madoch*, 108 F.3d 761, 762 (7th Cir. 1997) (executing multiple bogus refund schemes); *United States v. Workinger*, 90 F.3d 1409, 1411, 1414 (9th Cir. 1996) (submitting false financial statements to IRS officers); *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995) (attempting to interfere with an auction

of the taxpayer's property to pay a tax debt by filing a *lis pendens* action and distributing copies of the notice to prospective buyers); *United States v. Dykstra*, 991 F.2d 450, 451–53 (8th Cir. 1993) (filing fraudulent Forms 1099 claiming that defendant paid compensation to IRS employees involved in a collection action against him); *United States v. Martin*, 747 F.2d 1404, 1410–11 (11th Cir. 1984) (filing a false complaint against an IRS Revenue Agent investigating the taxpayer).

For this reason, Petitioner's proposed reading would merely bring the statute back to what even the DOJ stated it was just sixteen years ago: as a statute reserved for conduct "*typically . . . designed to impede or obstruct an audit or criminal tax investigation.*" CTM § 17.02 (2001 ed.). As the Court did in *Skilling*, it should limit the application of the statute to the "core" of § 7212 cases typically covered by the omnibus clause.

II. The "corruptly" *mens rea* requirement does not protect the statute from vagueness concerns or constitute a meaningful *mens rea* requirement.

The government argues that any constitutional vagueness concerns are assuaged by the *mens rea* requirement of the statute. The government further asserts that the definition of "corruptly" as supplied by the courts, does plenty to inform the average person about the type of conduct that is criminal in the IRS's omnipresent administration of the tax code.

As a practical matter, however, the "corruptly" *mens rea* requirement does little to cure vagueness concerns or restrict the omnibus clause's application. In many ways,

the requirement that the defendant have acted corruptly serves as a *mens rea* requirement in name only.

The term "corruptly" is not defined in the tax code. *See* 26 U.S.C. § 7701 (listing definitions). However, under the definition adopted by most circuit courts, to act "corruptly" is to "act with intent to gain an unlawful advantage or benefit either for oneself or for another." *See United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985); *Sorenson*, 801 F.3d at 1225; *Saldana*, 427 F.3d at 305; *Kelly*, 147 F.3d at 177; *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997); *United States v. Hanson*, 2 F.3d 942, 946–47 (9th Cir. 1993); *Popkin*, 943 F.2d at 1540.

Dismissing overbreadth and vagueness concerns, many courts, including the Second Circuit here, take comfort in the illusory prosecutorial limits they derive from the statutorily-undefined requirement that the defendant have acted "corruptly" to obstruct the administration of the tax code. Pet. App. 27a; *Marinello*, 839 F.3d at 222 ("other courts . . . have decided that section 7212(a)'s '*mens rea* requirement' sufficiently 'restricts the omnibus clause's reach only to conduct that is committed "corruptly"'") (internal citation omitted); *Kelly*, 147 F.3d at 176 (rejecting vagueness and overbreadth challenges to 7212(a) and agreeing with five other circuits in concluding that the use of the term "corruptly" in section 7212(a) does not render this provision unconstitutionally vague or overbroad) (citing *United States v. Brennick*, 908 F. Supp. 1004, 1010–13 (D. Mass. 1995)).

A. Whether the defendant had the "intent to obtain an unlawful benefit" depends on whether the benefit was unlawful, not on whether the defendant *knew* the benefit was unlawful.

The requirement that the defendant act "corruptly," as currently interpreted by some circuit courts, does not expressly require proof that the defendant *knew* the benefit he sought was unlawful. The "corruptly" *mens rea* requirement equates to a *mens rea* requirement in name only. It fails to comport with this Court's routinely-espoused scienter requirement. *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (stating that it is a basic principle that "'wrongdoing must be conscious to the criminal'" and "a defendant must be 'blameworthy in mind' before he can be found guilty") (internal citations omitted); *Gonzales v. Carhart*, 550 U.S. 124, 149–50 (2007) (stating that *mens rea* requirements "alleviate vagueness concerns" and "narrow the scope of the prohibition and limit prosecutorial discretion").

In *United States v. Sorenson*, the defendant used a trust scheme to reduce his taxable assets by $1.5 million. He was indicted on one count—obstructing the administration of the tax code. At trial, Sorenson insisted that he did not know that the use of the trusts or the reduction in tax liability was unlawful and asked the district court to instruct the jury that, to find him guilty, it must find that he *knew* the use of the trust scheme was illegal. 801 F.3d at 1229–30. The court refused to give the instruction and the Tenth Circuit affirmed, stating that "as in *Williamson*, we need not decide" whether the "definition of 'corruptly' already requires knowledge of illegality." *Id.* at 1230.

As the dissent below warned, the line between "aggressive tax avoidance" and "corrupt obstruction" can be hard to discern and is often not clear. Pet. App. 45a. Under the "corruptly" standard, as it is currently applied, criminality hinges on the prosecutor's ability to show a benefit was unlawful, rather than the mental state of the defendant at the time of the act or omission. *See* Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 673 (Winter 2006) ("While it would be impossible—and counterproductive—to attempt to stamp out all prosecutorial discretion, there is clearly a point beyond which the code's empowerment of prosecutors is harmful . . . [and] many former prosecutors like me—believe that we have passed that tipping point by a substantial margin.").

B. Even legal acts or omissions can be criminal.

The majority of circuits also hold that under the "corruptly" standard, even lawful conduct is criminal if done with the intent to obtain an unlawful benefit. *See Wilson*, 118 F.3d at 234 (stating that "[e]ven legal actions [can] violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others"); *Bostian*, 59 F.3d at 479 (posting an enlarged copy of a *lis pendens* violated 7212(a) where intended to impede the government's efforts to sell seized property); *Popkin*, 943 F.2d at 1540 (creating a company violated 7212(a) where "at least one intent in creating the corporation was to secure an unlawful benefit on his client"); *accord United States v. Kahre*, No. 05-CR-121, 2009 U.S. Dist. LEXIS 39473, at *9–11 (D. Nev. Apr. 20, 2009) (while buying

property in a family member's name is not, in and of itself, illegal, defendants could properly be convicted under § 7212(a) if they were motivated by a desire "to secure an unlawful benefit for oneself or for another"); *Biller*, 2006 U.S. Dist. LEXIS 100493, at *13 ("'The acts themselves need not be illegal. Even legal actions violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others.'") (citing *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995)).

This Court has cautioned that restraint in assessing a federal criminal statute's reach is particularly important where the act underlying the conviction is, by itself, innocuous. *Arthur Andersen LLP*, 544 U.S. at 703–04.

Under the Second Circuit's panel decision here, even doing nothing at all can be criminal if done with an intent to obtain an unlawful benefit. *Marinello*, 839 F.3d at 225 (holding that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code"); *see also Armstrong*, 974 F. Supp. at 531 (alleging the defendant withheld material information from his tax return preparer with regard to his travel expense reimbursements and income); *United States v. Bezmalinovic*, No. S3-96-CR-97, 1996 U.S. Dist. LEXIS 18976, at *5–6, (S.D.N.Y. Dec. 26, 1996) (alleging the defendant failed to report salary payments to certain employees "in any IRS Form W-2" or "to remit to the IRS the [payroll and unemployment] tax[es] due and owing").

The current application of the "corruptly" standard fails to narrow the statute's broad sweep or address this Court's perennial concerns about providing fair warning

of what constitutes criminal conduct. *See Arthur Andersen LLP*, 544 U.S. at 703.

C. The "unlawful benefit" does not need to be a tax benefit.

Under the law in some circuits, the "unlawful benefit" sought by the defendant does not even need to be a benefit under the tax code. In other words, the omnibus clause could be used to prosecute a person who obstructs the administration of Title 26 with the intent to seek *any* unlawful benefit. *United States v. Giambalvo*, 810 F.3d 1086, 1098 (8th Cir. 2016) (rejecting the argument that "'the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage'") (internal citation omitted); *Saldana*, 427 F.3d at 305 (holding that 7212(a) does not require that the defendant obtain benefits or advantages "under the tax laws" and upholding the conviction where Saldana filed reports with the IRS documenting false transactions with targeted individuals in astronomical amounts in the hope it would lead the IRS to audit those individuals); *United States v. Bowman*, 173 F.3d 595, 596–97 (6th Cir. 1999) (affirming a defendant's conviction for violation of § 7212(a) when the defendant had filed false 1099 and 1096 forms for the sole purpose of intimidating and harassing his creditors and finding that the defendant's conduct fell within the ambit of § 7212(a)'s proscribed conduct even though he sought no financial advantage or benefit for himself under the tax laws).

In this regard, under current authority from the lower courts, the omnibus clause of section 7212(a) has reached far beyond conduct directed at IRS employees.

See Keneally, *White Collar Crime*, *supra*, at 26, 28 (stating that "somewhat troubling[ly], however, the government and some courts have . . . expanded[ed] the reach of Section 7212(a) to circumstances in which the harassing conduct was not directed at IRS employees, but at other government employees or private citizens," notwithstanding the DOJ Tax Division's policy directive (current as of 1997), limiting prosecutions to "conduct directed at IRS personnel in the performance of their duties, or in the context of an on-going investigation or proceeding").

Title 26 covers all individuals and entities and governs transactions ranging from nonprofit creation, 26 U.S.C. § 501 *et seq.*, to financing presidential campaigns, 26 U.S.C. § 9001 *et seq.*, and taxing the sale of firearms. *See* 26 U.S.C. § 5801 *et seq.* Without even a requirement that the unlawful benefit obtained by the defendant be related to the tax code, and no requirement that the defendant actually *intended* to obstruct the administration of the tax code, *see* Part II.D *infra*, it is easy to imagine the myriad of conduct that could ultimately be alleged in an indictment to have impeded the administration of Title 26. Under Respondent's interpretation, an indictment under the omnibus clause could follow from any civil violation by a nonprofit, any regulatory violation for a gun sale, or a campaign finance infraction. *See United States v. Yagow*, 953 F.2d 423, 425–27 (8th Cir. 1992) (noting only that the defendant sought a *financial* advantage, not an advantage under the *tax laws*, by filing fraudulent IRS forms where defendant sent fraudulent IRS forms to individuals involved in repossessing his property during a bankruptcy action and to individuals involved in a state prosecution against his son for alcohol possession); *United*

States v. Allison, 264 Fed. App'x. 450, 451 (5th Cir. 2008) (upholding a conviction under the omnibus clause where the defendant filed IRS forms indicating that the police officer, city officials, and municipal judge involved in a traffic case against him had received billions of dollars in cash to presumably obtain a benefit in his case against them).

Similarly, prosecution under section 7212(a) does not require proof of a tax deficiency. *See Giambalvo*, 810 F.3d at 1097; *Floyd*, 740 F.3d at 32 ("A conviction for violation of section 7212(a) does not require proof of . . . a tax deficiency.").

D. The act or omission need not even actually obstruct or impede the administration of the tax code or be carried out with the intent to obstruct or impede the administration of the tax code.

In *Popkin*, one of the seminal § 7212 circuit court cases relied upon by the government, there was no evidence that the only act charged in the redacted indictment—creating a California corporation for another person to disguise the character of illegally earned money and repatriate it—either actually did obstruct, or was intended to obstruct, the due administration of the Internal Revenue Code. 943 F.2d at 1538. Instead, the court held that that Popkin acted corruptly "because at least one intent in creating the corporation was to secure an unlawful benefit for his client." *Id.* at 1540.

At the time, money laundering was not a crime, and as the dissent in *Popkin* pointed out:

> [T]he indictment alleges only that the defendant created a corporate entity for the purpose of disguising illegal income in violation of Title 26. The indictment does not allege and the Government even now does not satisfactorily explain how this without more violates the tax laws. Although the illegal nature of the funds would have been successfully concealed, [the third party] still could have paid any tax obligations owed on the money without violating the tax laws at all.
>
> [. . .]
>
> The court's interpretation of this section of the tax law has the effect of virtually eliminating the word "corruptly" from the statute. The statute requires that the defendant must "corruptly" obstruct or endeavor to obstruct the execution of the tax laws. This should mean something more than just obstructing the execution of the laws as a matter of fact. There is nothing inherently "corrupt" about the formation of a corporation.

Id. at 1541–42 (Roney, J., dissenting). By the government's reading of the statute, there is simply no nexus between the "corrupt" act or omission and any actual obstruction or intent to obstruct the administration of the tax code at the time of that act or omission. *See Aguilar*, 515 U.S. at 599 (holding that under section 1503 the act must have a "relationship in time, causation, or logic" or the "natural and probable effect" of interfering with the due administration of justice).

The Respondent seeks to nullify this requirement by its argument that individuals are always on notice that the IRS is administering the tax code and should thus always be aware of their potential to obstruct it. *See* BIO at 9. This argument has been rejected by at least one court. *See United States v. Ogbazion*, No. 15-CR-104, 2016 U.S. Dist. LEXIS 143358, at *47–50 (S.D. Ohio Oct. 17, 2016) (applying Sixth Circuit law, rejecting the government's argument that defendant did have knowledge that his conduct would obstruct an IRS action because his company had "hundreds of locations, hundreds of employees, and by its nature, [was] continually subject to IRS scrutiny and review" and dismissing the count brought under the omnibus clause). And it further highlights the need for this court to cabin the omnibus clause's application to cases where the defendant had knowledge of an IRS action, audit, or investigation. *See Kassouf*, 144 F.3d at 955. The statute is simply too broad as applied by the majority interpretation, and should be narrowed by this Court.

CONCLUSION

For the foregoing reasons, the Court should vacate Mr. Marinello's conviction under the omnibus clause of 26 U.S.C. § 7212(a), reverse the Second Circuit, and remand for proceedings consistent with this Court's order.

Respectfully submitted,

JOSHUA L. DRATEL
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W.
Washington, D.C. 20036
(202) 872-8600

JOHN VECCHIONE
ERICA L. MARSHALL*
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
erica.marshall@causeofaction.org

**Counsel of Record*

Counsel for Amici Curiae

RECORD AND BRIEFS

FILED
SEP - 8 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1144

In the Supreme Court of the United States

CARLO J. MARINELLO, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI* CURIAE SUPPORTING PETITIONERS

KATE COMERFORD TODD
WARREN POSTMAN
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20006
(202) 463-5337

KAREN R. HARNED
ELIZABETH MILITO
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Suite 200
Washington, D.C. 20004
(202) 406-4443

LEWIS J. LIMAN
Counsel of Record
DIANA L. WOLLMAN
NOWELL D. BAMBERGER
JONATHAN GIFFORD
ERICA KLIPPER
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
lliman@cgsh.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. The Second Circuit's Standard Could Subject a Wide Range of Innocent Economic Activity to Criminal Prosecution 4

A. Virtually Any Economic Activity Could Make the IRS's Job More Difficult 4

B. The "Corruptly" *Mens Rea* Does Not Meaningfully Limit the Omnibus Clause 16

II. The Broad Interpretation of the Omnibus Clause Risks the Specter of Arbitrary Enforcement 18

III. The Second Circuit's Unbounded Interpretation of the Omnibus Clause Will Vastly Increase the Costs and Burdens of Tax Compliance 22

IV. The Second Circuit's Interpretation Will Also Impede Development of Tax Law by Discouraging Litigation 27

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Altera Corp. v. Comm'r,
145 T.C. No. 3 (2016) 28

Baggett v. Bullitt,
377 U.S. 360 (1964) 20

Champion v. Ames,
188 U.S. 321 (1903) 21

City of Philadelphia v. Baretta U.S.A. Corp.,
277 F.3d 415 (3d Cir. 2002) 22

Dobson v. Comm'r,
320 U.S. 489 (1943) 24

Dowling v. United States,
473 U.S. 207 (1985) 20

Eaton Corp. v. Comm'r,
114 T.C.M. (CCH) 90 (2017) 12

Garvey, Inc. v. United States,
726 F.2d 1569 (Fed. Cir. 1984) 27

Grecian Magnesite Mining, Indus. & Shipping Co. v. Comm'r, 149 T.C. No. 3 (2017) 28

Guidant LLC v. Comm'r,
146 T.C. No. 5 (2016) 8

Helvering v. Gregory,
69 F.2d 809 (2d Cir. 1934) 6

Johnson v. United States,
135 S. Ct. 2551 (2015) 3

Kolender v. Lawson,
461 U.S. 352 (1983) 19

Limited, Inc. v. Comm'r,
286 F.3d 324 (6th Cir. 2002) 28

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 22

Mayo Found. for Med. Educ. & Research v.
United States, 562 U.S. 44 (2011) 10, 11

McDonnell v. United States,
136 S. Ct. 2355 (2016) 19

Morrison v. Olson,
487 U.S. 654 (1988) 19

Mortensen v. Comm'r,
440 F.3d 375 (6th Cir. 2006) 29

NAACP v. Button,
371 U.S. 415 (1963) 31

Newark Morning Ledger Co. v. United States,
507 U.S. 546 (1993) 9

Olive v. Comm'r,
139 T.C. 2 (2012) 23

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 3, 19

Plantation Patterns v. Comm'r,
462 F.2d 712 (5th Cir. 1972) 13

Screws v. United States,
325 U.S. 91 (1945) 20

Skilling v. United States,
561 U.S. 358 (2010) 19

Storey v. Comm'r,
103 T.C.M. (CCH) 1631 (2012) 8

United Dominion Indus. v. United States,
532 U.S. 822 (2001) 20

United States v. Aguilar,
515 U.S. 593 (1995) 4, 19, 20

United States v. Arthur Young & Co.,
465 U.S. 805 (1984) 12

United States v. Floyd,
740 F.3d 22 (1st Cir. 2014) 16

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998) 4

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998) 16

United States v. Marinello,
855 F.3d 455 (2d Cir. 2017) 3, 17

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) 4, 5, 6, 8, 14

United States v. Popkin,
943 F.2d 1535 (11th Cir. 1991) 4

United States v. Reese,
92 U.S. 214 (1875) 18, 20

United States v. Reeves,
752 F.2d 995 (5th Cir. 1985) 16

United States v. Santos,
553 U.S. 507 (2008) 20

United States v. Sorenson,
801 F.3d 1217 (10th Cir. 2015) 5

United States v. Sun-Diamond Growers of Cal.,
526 U.S. 398 (1999) 19

United States v. Wilson,
118 F.3d 228 (4th Cir. 1997) 16

Whole Woman's Health v. Hellerstedt,
136 S. Ct. 2292 (2016) 22

Williams Cos. v. Energy Transfer Equity, L.P.,
159 A.3d 264 (Del. 2017) 14

Yates v. United States,
135 S. Ct. 1074 (2015) 19

STATUTES

18 U.S.C. § 1503(a) 4

26 U.S.C. § 11 7

26 U.S.C. § 162 8

26 U.S.C. § 197 9

26 U.S.C. § 263 9

26 U.S.C. § 263A 9

26 U.S.C. §§ 351-368 ..... 7, 17

26 U.S.C. § 701 7

26 U.S.C. § 702 7

26 U.S.C. § 956(c) 28

26 U.S.C. § 1001 12

26 U.S.C. § 1011 12

26 U.S.C. § 1031 7

26 U.S.C. § 1363 7

26 U.S.C. § 1366 7

28 U.S.C. § 2201 28

26 U.S.C. § 6001 11

26 U.S.C. § 6042(b)(3) 12, 17

26 U.S.C. § 6601 26

26 U.S.C. § 6662 ..... 17, 26

26 U.S.C. § 7203 27

26 U.S.C. § 7212(a) 2

26 U.S.C. § 7421(a) 28

OTHER AUTHORITIES

1st Cir. Pattern Crim. Jury Instruction 4.26.7212 (2017) 5

11th Cir. Pattern Crim. Jury Instruction O111 (2016) 5

David E. Bernstein & Ilya Somin, Judicial Power and Civil Rights Reconsidered, 114 Yale L.J. 591 (2004) 21

George Contos et al., IRS, Taxpayer Compliance Costs for Corporations and Partnerships: A New Look (2009), https://www.irs.gov/pub/irs-soi/12rescontaxpaycompliance.pdf 25

Christopher V. Cotton, Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era, 24 J. Corp. L. 417 (1999) 25

Delegation Order 9-6, Internal Revenue Manual § 1.2.48.7 (Feb. 6, 2013), https://www.irs.gov/irm/part1/irm_01-002-048.html 30

IRS, Data Book (2016), https://www.irs.gov/pub/irs-soi/16databk.pdf 28, 29

IRS, Internal Revenue Manual § 25.1.3 (Aug. 24, 2016), https://www.irs.gov/irm/part25/irm_25-001-003r.html 30

IRS, U.S. Dep't of the Treasury, Pub. No. 1779, Independent Contractor or Employee? (2007) . 10

KPMG, A Look Inside Tax Departments Worldwide and How They Are Evolving (2016), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/11/global-tax-benchmarking-survey.pdf 24, 25

Matthew Josephson, The Robber Barons: The Great American Capitalists, 1861-1901 (Transaction Publishers 2010) (1934) 21

Jason Russell, Look At How Many Pages Are in the Federal Tax Code, Wash. Examiner, (Apr. 15, 2016), http://www.washingtonexaminer.com/look-at-how-many-pages-are-in-the-federal-tax-code/article/2563032 24

Small Bus. Ass'n, Frequently Asked Questions (Jan. 2011), https://www.sba.gov/sites/default/files/sbfaq.pdf 24

Staff of U.S. H.R. Comm. on Oversight and Gov't Reform, 113th Congress, The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses? (May 29, 2014), http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf 22

Treas. Reg. § 1.905-2(2) 12

Treas. Reg. § 1.1012-1(a) 12

Treas. Reg. § 1.1016-1 12

Treas. Reg. § 1.6001-1 11

Treas. Reg. § 1.6042-3(c) 12, 17

Treasury Inspector Gen. for Tax Admin., U.S. Dep't of the Treasury, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (May 14, 2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf 22

Treasury Order 150-35 (July 10, 2000) 30

Diane L. Yetter & LeAnn Luna, The Best Practices of a Best-in-Class Corporate Tax Department, 23 J. Multistate Tax'n & Incentives 20 (2013) 25, 26

INTERESTS OF *AMICI*

Amici Curiae, the Chamber of Commerce of the United States of America (the "Chamber") and the National Federation of Independent Business (the "NFIB"), submit this brief pursuant to Rule 37 of the Rules of the Supreme Court.[1]

The Chamber is the world's largest business federation. It represents the interests of more than three million businesses of every size, in every sector, and from all regions of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The NFIB is the nation's leading small business advocacy association, representing member businesses in all fifty states and the District of Columbia. The NFIB's members range from sole proprietors to firms with hundreds of employees, and collectively they reflect the full spectrum of America's small business owners. The NFIB defends the freedom of small business owners to operate and grow their businesses and promotes public policies that recognize and encourage the vital contributions that small businesses make to our national economy.

---

[1] All parties who appear in this appeal have consented to the filing of this brief. The parties' consents are submitted herewith. No portion of this brief was authored by counsel to any party in this action, nor has anyone other than *Amici* contributed monetarily to the preparation of this brief.

The Chamber's and the NFIB's interests in this case derive from the fact that the Second Circuit's interpretation of the omnibus clause of 26 U.S.C. § 7212(a) (the "Omnibus Clause") is so overbroad and expansive that it threatens to criminalize a wide array of lawful business conduct, vastly increase the costs to small businesses of ordinary course tax compliance, result in businesses paying more taxes than they owe in order to avoid being accused of a felony, and chill the important role that taxpayer challenges play in the development of the tax law.

The Chamber, the NFIB, and their members have an interest that the Omnibus Clause be interpreted, consistent with its purpose, to address attempts by a taxpayer to interfere with a known Internal Revenue Service ("IRS") investigation, examination, or proceeding. The Chamber, the NFIB, and their members also have an interest in a workable tax regime that allows taxpayers, including small businesses, to implement and follow record-creation and record-maintenance procedures that are reasonable, rather than overly burdensome, without the fear that failing to create or maintain a specific record may be charged, or threatened to be charged, as a felony. Finally, the Chamber, the NFIB, and their members have an interest that economic legislation be given predictable, concrete interpretations that provide clear guidance of what is prohibited, and avoid vague constructions that may serve as the basis for selectively prosecuting disfavored businesses and individuals for who they are, rather than what they have done.

SUMMARY OF THE ARGUMENT

The Second Circuit below adopted an interpretation of the Omnibus Clause that is so sweeping and overbroad that it would criminalize a vast array of otherwise lawful conduct, chill economic activity, and provide the IRS with a weapon with which to target particular small businesses, not because of their conduct, but because of their identity. The Second Circuit's interpretation would also chill the development of the tax law and place the power to determine what the law is not in the hands of the courts, but in the hands of the Executive.[2] Unless this Court limits its reach, the Omnibus Clause will resemble less a statute protecting the IRS from obstructive conduct, and more the sort of broad and vague enactment of which this Court has repeatedly disapproved. See, e.g., Johnson v. United States, 135 S. Ct. 2551 (2015); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

For substantially the reasons argued by the Petitioner and set out by Judges Jacobs and Cabranes in their opinion dissenting from the denial of rehearing *en banc*, United States v. Marinello, 855 F.3d 455 (2d Cir. 2017), this Court should limit the application of the Omnibus Clause to those cases in which the defendant was aware of some ongoing IRS process or proceeding and acted to obstruct or impede it. See

---

[2] *Amici* do not address the specific circumstances of the Petitioner's convictions, except to observe that they illustrate the lack of any need for a catch-all provision in light of the specific prohibitions on tax evasion already found in the United States Internal Revenue Code.

United States v. Kassouf, 144 F.3d 952, 955-58 (6th Cir. 1998); United States v. Popkin, 943 F.2d 1535, 1543 (11th Cir. 1991) (Roney, J., dissenting) ("The legislative history reveals that Congress intended only to prohibit interference with IRS agents, either through physical or verbal threats or through other actions which impeded their efforts to enforce the tax code."); see also United States v. Aguilar, 515 U.S. 593, 599 (1995) (holding nearly identical provision in 18 U.S.C. § 1503(a) prohibiting obstruction of "the due administration of justice" required defendant to "inten[d] to influence judicial or grand jury proceedings"). *Amici* submit this brief to highlight the practical effects that the Second Circuit's interpretation of the Omnibus Clause will have on economic activity and the development of the law if it is not overturned.

ARGUMENT

I. The Second Circuit's Standard Could Subject a Wide Range of Innocent Economic Activity to Criminal Prosecution

A. Virtually Any Economic Activity Could Make the IRS's Job More Difficult

The Second Circuit held that an act that has the effect of impeding or obstructing the due administration of the Internal Revenue Code (the "Code"), or endeavoring to do so – whether or not actually directed at the IRS or its processes – constitutes a felony under the Omnibus Clause. United States v. Marinello, 839 F.3d 209, 221-22 (2d Cir. 2016). In the court's words, "section 7212(a)'s omnibus clause prohibits any effort to obstruct the

administration of *the tax code*, not merely of investigation and proceedings conducted by the tax authorities." Id. at 221 (citation and internal quotation marks omitted). The sole limit on that sweeping holding is the requirement that the act be done "corruptly." Id. However, as explained further below, that caveat offers little comfort for businesses that attempt to comply in good faith with the Code.

It is difficult to overstate the sweeping nature of the conduct that could trigger criminal prosecution under the Second Circuit's ruling. "To 'obstruct or impede' is to hinder or prevent from progress; to slow or stop progress; or to make accomplishment difficult and slow." United States v. Sorenson, 801 F.3d 1217, 1229 (10th Cir. 2015) (upholding Omnibus Clause jury instruction); see also 1st Cir. Pattern Crim. Jury Instruction 4.26.7212 (2017) ("To 'obstruct or impede' means to hinder, interfere with, create obstacles or make difficult."); 11th Cir. Pattern Crim. Jury Instruction O111 (2016) ("To 'try to obstruct or impede' is to consciously attempt to act, or to take some steps to hinder, prevent, delay, or make more difficult the proper administration of the Internal Revenue laws."). Accordingly, any act that has the effect of making it more difficult or time-consuming for the government to collect tax revenues or for the IRS to investigate and audit tax returns and determine the amount of taxes due could conceivably, under the Second Circuit's interpretation, trigger the Omnibus Clause and subject a defendant to years in prison.

The Second Circuit itself observed that "the administration of the Internal Revenue Code encompasses a vast range of activities," including

"mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers' submissions; as well as monitoring taxpayers' compliance with their obligations." Marinello, 839 F.3d at 221 (citation and internal quotation marks omitted). The government rightly notes these activities are "ubiquitous." Br. for the United States in Opp'n 9 (May 22, 2017). A taxpayer's actions or inactions can interfere with tax administration in myriad ways. The Indictment here included failing to maintain corporate books and records, making payments in cash, and failing to respond to an accountant's request for information. Marinello, 839 F.3d at 213. The next case could include claiming a deduction that the prosecution (after the fact) determines should have been disallowed (even if the IRS never sought the disallowance) or failing to save a receipt that the prosecution believes (in retrospect) the IRS would have liked to have seen (even if the IRS never in fact requested the receipt or even conducted an audit). But for the Second Circuit's overbroad reading of the Omnibus Clause, however, none of these actions have been traditionally understood to support felony charges.

It is a fundamental axiom of our law, well-established for decades, that "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J.) (citations omitted). The Second Circuit's interpretation encompasses, and potentially criminalizes, virtually all activity in the life

history of a business taken – as our free market economy expects – to incur the lowest tax burden possible or taken for purely business reasons but which have the effect of making the IRS's job more difficult. A few examples illustrate the point.

Business Structuring. The efforts of a fledgling business to maximize its tax efficiency may begin with the choice of the form in which to conduct its activity. The Code imposes different obligations on businesses and their owners depending on which form they choose. For example, if a business is organized as a corporation, the Code generally imposes two layers of taxes: one on the net income of the corporation, and a second when the corporate profits are distributed to shareholders. By contrast, if a business is organized as a "subchapter S corporation" or a partnership, the Code generally imposes only one layer of tax (i.e., at the owner level). See 26 U.S.C. § 11 (2012) (imposing tax on the net income of corporations); id. §§ 1363, 1366 (imposing tax at shareholder level in case of a subchapter S corporation); id. §§ 701, 702 (imposing tax at partner level in case of a partnership). Similarly, the expansion of a business by acquiring or merging with a competitor can be planned so that it is tax-free to all parties by ensuring that certain requirements are met. Indeed, the Code includes extensive rules designed to *incentivize* taxpayers to plan mergers so that they do qualify as tax-free. See id. §§ 351-368 (referred to as "subchapter C"). In a similar way, the Code encourages taxpayers to plan exchanges of like-kind property to qualify as tax-free under the like-kind exchanges rules. See id. § 1031.

Decisions about structuring one's business and planning corporate transactions are accordingly directly relevant to both the amount of taxes due and the ability of the IRS readily to determine the amount of taxes due. A business's decision to set up a complex structure, or to do business through separate entities (often done for liability management reasons) could be seen to impede "the administration of *the tax code*," Marinello, 839 F.3d at 221, in the sense of making the IRS's efforts to examine more difficult (had the IRS chosen to examine). See, e.g, Guidant LLC v. Comm'r, 146 T.C. No. 5 (2016) (taxpayer did business through multiple entities and argued IRS adjustment needed to be broken down by entity and not aggregated as the IRS had done). In theory, such decisions could subject the business to prosecution under the Omnibus Clause without any proof that there were any taxes avoided and even if the IRS did not, in fact, conduct an examination.

Deduction of Expenses. There is no business that does not confront the issue of when to spend money and on what. The Code imposes dramatically different consequences on expenditures depending on their purpose and character. An expenditure that is not "ordinary and necessary" to the conduct of the trade or business is not deductible. 26 U.S.C. § 162. Whether a specific expense meets that standard is often unclear. See, e.g., Storey v. Comm'r, 103 T.C.M. (CCH) 1631 (2012) (rejecting IRS's challenge that taxpayer's documentary filmmaking activity was a "hobby," and instead finding that filmmaking expenses were deductible where books and records demonstrated filmmaking was "conducted with continuity and regularity" and she "was engaged in activity for

profit"). Additionally, an expenditure that meets the standard may still not be deductible currently – e.g., amounts spent to acquire or improve long-term business assets, such as purchasing a new building or improving machinery – but may instead be required to be capitalized and then deducted over a number of years. See 26 U.S.C. §§ 263, 263A; see also id. § 197; Newark Morning Ledger Co. v. United States, 507 U.S. 546, 570-71 (1993) (holding, in the face of an IRS challenge, that a taxpayer satisfied "its substantial burden" of satisfying the requirements to depreciate an intangible asset; in part spurring simplification of the Code).

Under the Second Circuit's interpretation, a creative (or aggressive) prosecutor could root through a business's records to find expenses that it (post-hoc) determines were personal and thus should not have been deducted or were not supported by a record (and thus would have made an audit more difficult) even in the absence of evidence of any tax due and owing. It is not difficult to imagine the government taking the position that determining the proper treatment of an expenditure would be less difficult if the taxpayer had created (or maintained) more extensive documentation of the reason for the expenditure and the benefits derived. Nor is it difficult to imagine the government taking the position (either during an IRS examination or, after the fact, in a criminal case) that the characterization in a close case of an expense as a business expense (with the result that less tax revenue is collected) would impede the administration of the Code. In each of those instances, the taxpayer's conduct could constitute obstruction under the Second Circuit's interpretation of the Omnibus Clause.

Timing of Revenue Recognition. If a business is generating revenue, its tax bill will be significantly impacted by *when* that revenue is recognized for tax purposes. But the timing rules are notoriously complex and highly dependent upon the specific facts and circumstances of the situation. Mistakes are common enough that for taxpayers who discover their own mistakes before the IRS does, the IRS has special procedures and rules for the taxpayer to follow to correct the mistakes, which include alerting the IRS to the mistake. The IRS's job is surely made more difficult by a taxpayer who fails to find and correct its own mistake; under the Second Circuit's interpretation of the Omnibus Clause, such failure may also be a felony.

Employee Tax Withholding. In the ordinary course of its activity, a business will make decisions regarding who to hire, and whether to hire employees or to rely on independent contractors. Those decisions impact the administration of the Code, which requires employers to withhold federal taxes from their employees' wages and pay over those withheld taxes to the IRS. Wage withholding is required by the tax law in part to facilitate compliance by the individual employees; this, of course, makes tax administration less burdensome for the IRS. But wage withholding applies only if a worker is an "employee," and does not apply if the worker is an independent contractor. See IRS, U.S. Dep't of the Treasury, Pub. No. 1779, Independent Contractor or Employee? (2007) (describing the facts and circumstances to be evaluated in order to determine whether someone is an employee or independent contractor in any given case); see also Mayo Found. for Med. Educ. & Research v. United

States, 562 U.S. 44, 59-60 (2011) (addressing whether medical residents are "employees" or "students" for U.S. tax purposes). Under the Second Circuit's interpretation, a business that does not withhold wages from a single employee in a single period would impede the administration of the tax code and thus could be guilty of a felony, regardless of whether that business avoided any taxes or intended to evade any taxes.

Document Retention. Daily decisions about the types of documents that a business prepares and maintains may also be seen as impeding administration of the Code. The Code and regulations impose broad recordkeeping obligations that are potentially limitless in scope and duration. See 26 U.S.C. § 6001 (requiring taxpayers to keep such records as the Secretary of Treasury prescribes); Treas. Reg. § 1.6001-1 (requiring taxpayers to keep records "as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown" on any tax return, and to retain such records "so long as the contents thereof *may become material* in the administration of any internal revenue law" (emphasis added)). Businesses invest a great deal of effort, time, and resources into creating and maintaining records sufficient to support their tax reporting. However, companies do not generally retain every document they ever create or generate every possible type of documentation that the IRS could ever want. The failure of a company to have available a document that the government believes would have been relevant to an IRS proceeding (even if the business is not aware of any IRS proceeding) could, under the Second Circuit's interpretation, impede the

administration of the Code and be chargeable as obstruction under the Omnibus Clause.

The types of documents that may be relevant to the administration of the Code and whose absence may impede that administration is vast. See United States v. Arthur Young & Co., 465 U.S. 805, 814 (1984) (explaining that Congress intended "to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation"). It includes information regarding foreign tax credits for businesses that operate and pay taxes overseas, Treas. Reg. § 1.905-2(2); information regarding a business's earnings and profits for companies that make shareholder distributions, 26 U.S.C. § 6042(b)(3); Treas. Reg. § 1.6042-3(c); and information regarding an asset's basis – which is determined by reference to potentially decades-old records that the company may no longer have – in the case of a company selling assets, see, e.g., 26 U.S.C. §§ 1001, 1011; Treas. Reg. §§ 1.1012-1(a), 1.1016-1.

Indeed, the IRS has the right to challenge (and may challenge) a taxpayer's position long after the taxes are paid and, in some cases, long after having affirmatively accepted the taxpayer's position in earlier tax years, creating significant recordkeeping challenges that far exceed what most people understand to be their obligations with respect to tax records. See, e.g., Eaton Corp. v. Comm'r, 114 T.C.M. (CCH) 90 (2017) (rejecting IRS's argument that taxpayer misrepresented material facts during negotiations that took place fifteen years earlier on the basis of significant contemporaneous documentation the taxpayer had created and retained). The Second Circuit's interpretation of the Omnibus Clause creates a risk not only that the unavailability of

records itself would be a violation, but also that because they lack records to do so taxpayers may be unable to establish that tax positions adopted long ago were *not* efforts to obstruct the IRS.

Shareholder Guarantees. Particularly for small businesses, it is not uncommon for lenders to require that a shareholder or owner guarantee a loan made to the business. The IRS and taxpayers often disagree as to whether a shareholder's guarantee of a corporate debt results in the shareholder, rather than the corporation, being treated as the borrower for tax purposes (which impacts who is entitled to claim deductions for interest paid on the debt). See Plantation Patterns v. Comm'r, 462 F.2d 712, 723-24 (5th Cir. 1972) (guarantee of corporation's debt by shareholder and CEO of small business resulted in shareholder, rather than the corporation, being treated as the borrower entitled to deduct the interest for tax purposes). The determination is very fact-specific. For a sizeable fee, large companies will often, at the time they obtain the loan, obtain a letter from a bank stating that the bank would have been willing to extend a loan of the same amount to the company without the shareholder guarantee, just with more onerous terms (such as a higher interest rate) (a so-called "Plantation Patterns letter"). Such a letter promotes the administration of the tax code in the sense that in the absence of such a letter in an IRS audit, the IRS must engage in a complex, time-consuming, and expensive investigation. Thus, much like the failure to maintain a record of an expense, the failure of a business to obtain a Plantation Patterns letter (even though the IRS has never specifically required such a letter) could be viewed as an

impediment to the administration of the Code and to the IRS's ability to determine the proper taxes due.

Considering Retaining an Outside Accountant. Businesses are not obligated to hire an outside accountant or lawyer to provide tax services. Yet, they may consider doing so, and may even interview several before selecting one. Petitioner considered hiring an outside tax accountant and spoke to one about his tax situation, but ultimately decided not to retain the accountant. The Second Circuit affirmed Petitioner's conviction for (at least potentially) failing to provide to the accountant *whom he did not hire* all of the documentation relevant to his tax situation on the theory that such action impeded the administration of the tax code. Marinello, 839 F.3d at 224 & n.14. Similarly, it is not altogether unusual for a business to seek a second opinion on a complex tax question, and where the two opinions differ, the taxpayer can only follow one of them.[3] Surely the IRS's job might be made easier if every taxpayer retained a professional tax advisor and followed every bit of advice received (if, of course, the IRS on audit agreed with that advice – a not so small "if"); but the failure to do so (even if it impedes the administration of the Code) should not be – as the Second Circuit's decision makes it – a potential felony.

* * *

[3] Indeed, in a recent court decision involving a complex tax question, four tax advisors were consulted and each one expressed a different opinion as to the correct answer. Williams Cos. v. Energy Transfer Equity, L.P., 159 A.3d 264, 269-70 (Del. 2017).

All of these instances reflect cases in which a taxpayer may be argued to have taken actions that impede the administration of the Code by choosing one course of action in circumstances where choosing an alternative course of action would have resulted in the payment of a different amount of taxes, or where the course chosen would have required the IRS (if it had audited) to do more extensive fact-finding and analysis to determine whether the right amount of taxes were paid. Given the complexity and ambiguity of the Code, and the fact-sensitive nature of the determinations it requires, however, it will always be relatively easy for a prosecutor after the fact to say that an action taken with no intent at all to evade taxes had the effect of generating the wrong amount of tax revenue or making the tax authorities' job more difficult and thus impeding the administration of the Code.

Absent a requirement that the government prove that the taxpayer was aware of a specific ongoing tax collection procedure, it would remain open to prosecutors to argue that the target of any investigation violated the Omnibus Clause through nothing more than business decisions regarding the organization of its affairs, on the theory that such decisions would have made the IRS's ability to determine the amount of taxes due more difficult or had the effect of generating less tax revenue than what the government could claim – on the basis of post hoc judgment – was required to be paid under the Code.

B. The "Corruptly" *Mens Rea* Does Not Meaningfully Limit the Omnibus Clause

The government may argue that none of these activities would fall within the scope of the Omnibus Clause unless they were taken "corruptly." If the taxpayer had only taken the actions that the government would have wanted the taxpayer to take, the taxpayer would not have been subject to criminal charges. According to the government's argument, only those acts of tax minimization that are inconsistent with the Code and that are taken with the intent to obtain an unlawful benefit for the taxpayer or someone else violate the Omnibus Clause. Br. for the United States in Opp'n 11 (May 22, 2017) ("[C]ourts have found the necessary limits in the statute's *mens rea* requirement").

But the Omnibus Clause, and the cases interpreting its "corruptly" requirement, give cold comfort. The "corruptly" element requires only that the defendant have an intent to benefit and that the benefit turns out to be unlawful. See, e.g., United States v. Floyd, 740 F.3d 22, 31 (1st Cir. 2014) ("corruptly" means "an intent to procure an unlawful benefit either for the actor or some other person" (citations omitted)); United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998); United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985); see also United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997) ("The [defendant's] acts themselves need not be illegal."). It does not require the government to prove that the defendant intended to evade taxes or have any knowledge that its conduct was unlawful. But our law encourages businesses – as a matter of tax policy and, in some cases, as a

matter of fiduciary duty – to take actions to benefit themselves, i.e., to pay no more taxes than are rightfully due and, where that is not clear, businesses are not obligated to select the highest tax bill possible. The tax law is complex and fact-dependent and it would not be difficult for the government to allege after the fact that an action that the business claimed was in good faith conferred a benefit that was not justified, i.e., was unlawful. And, as Judges Cabranes and Jacobs observed dissenting from denial of rehearing *en banc*, "the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Marinello, 855 F.3d at 457.

Prior to the Second Circuit's decision (and the decisions of other courts adopting the same interpretation), the consequence of an incorrect judgment or the failure to have created or maintained a document to support a tax position might be a disallowed deduction, the shifting of the burden of proof or, at worst, the imposition of a penalty. See 26 U.S.C. § 6662 (imposing an accuracy-related penalty on underpayments). For example, failing to affirmatively take steps to ensure all necessary requirements are met in a business restructuring may result in the transaction being taxable to all parties. See id. §§ 351-368. Likewise, where a company lacks the records needed to substantiate its tax position, a shareholder distribution may be treated as a taxable dividend or a sale of company assets may be taxed at the full sale value without an adjustment for basis. See id. § 6042(b)(3); Treas. Reg. § 1.6042-3(c).

But under the Second Circuit's decision, virtually every business decision taken because of its potential tax consequences could be subject to review and potentially prosecutable. An "unlawful benefit" could be simply paying less taxes than was legally required, on the basis of having adopted an interpretation of the Code that a court ultimately determines was incorrect. It could also be a benefit wholly unrelated to taxation – for example, employing undocumented workers, unknowingly making a charitable donation to a fraudulent charity, or violating government procurement rules. In each of these cases – and countless others – under the Second Circuit's interpretation and in the absence of any independent requirement that the defendant know of a pending IRS proceeding, it could be said that the defendant has acted "corruptly" by either receiving or conferring on someone else a benefit that, it turns out, the law does not permit.

II. The Broad Interpretation of the Omnibus Clause Risks the Specter of Arbitrary Enforcement

This Court has long expressed the concern that criminal statutes not be given vague and overbroad interpretations that could give rise to the risk of selective, discriminatory enforcement. United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). Recent jurisprudence reflects a trend of reading broadly-worded criminal statutes in a manner that

gives effect to their clear purpose and notice to potential offenders of what is prohibited. See United States v. Aguilar, 515 U.S. 593, 599 (1995) (holding that obstruction of justice only occurs where "the act [has] a relationship in time, causation, or logic with the judicial proceedings"); United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 405, 408 (1999) (interpreting the illegal gratuity statute to require payment of a bribe or gratuity in connection with a "*specific* official act" and rejecting an interpretation that would permit prosecutions limited by "nothing but the Government's discretion" (emphasis added)); McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016); Yates v. United States, 135 S. Ct. 1074, 1079 (2015); Skilling v. United States, 561 U.S. 358, 408-09 (2010).

As this Court has recognized, vague and overbroad laws serve to invite selective and discriminatory enforcement. "If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted." Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting Robert H. Jackson, The Federal Prosecutor, Second Annual Conference of United States Attorneys, April 1, 1940); see also Kolender v. Lawson, 461 U.S. 352, 358 (1983) (criminal law cannot sanction "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections" (alteration in original) (citation omitted)); Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (holding that unconstitutionally vague vagrancy statute was subject to "harsh and

discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" (citation omitted)); Screws v. United States, 325 U.S. 91, 149 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting) ("[M]isuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government[;] proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties."). For this reason and others, this Court's jurisprudence in this regard reflects a proper "restraint in assessing the reach of a federal criminal statute," Aguilar, 515 U.S. at 600, consistent with both separation of powers, see Dowling v. United States, 473 U.S. 207, 213-14 (1985); Reese, 92 U.S. at 221, and the traditional rule of lenity governing the interpretation of criminal statutes, see United States v. Santos, 553 U.S. 507, 514-21 (2008), see also Baggett v. Bullitt, 377 U.S. 360, 373 (1964) ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."); United Dominion Indus. v. United States, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) ("At a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter.").

The Second Circuit's interpretation gives rise to precisely these concerns. By threatening to sweep into the scope of the Omnibus Clause and make into a felony ordinary business conduct engaged in to minimize taxes and maximize profits, the court's interpretation hands the prosecutor a weapon with

which to attack businesses not because of what they have done but because of who they are.

The *in terrorem* impact of that interpretation would be momentous. Our country's history is replete with examples of legitimate businesses publicly attacked because of who owned them and the religious and political beliefs of the owners, what products they sold, whom they chose to do business with, or who they employed. In the early nineteenth century, as today, those businesses included financial institutions whose lending activities made them an easy target of attack. With the growth of the country's population and the industrial revolution, it included businesses run or owned by minorities or immigrants, as well as by those who managed large aggregations of wealth and were known as "robber barons." See David E. Bernstein & Ilya Somin, Judicial Power and Civil Rights Reconsidered, 114 Yale L.J. 591, 620 (2004) (discussing the use of "facially neutral legislation" by southern planters to suppress African American economic mobility after Reconstruction); see also Matthew Josephson, The Robber Barons: The Great American Capitalists, 1861-1901 359 (Transaction Publishers 2010) (1934) (regarding passage of the Sherman Anti-Trust Act, quoting an unnamed senator to have "remarked that no one knew what the bill would do to the Trusts, but nearly everyone agreed that 'something must be flung out to appease the restive masses'"). Businesses that peddled in products considered licentious were not free from attack. Champion v. Ames, 188 U.S. 321, 330 (1903) (affirming conviction of freight carrier for transporting lottery tickets across state lines).

Today, public opinion has turned against or could turn against companies that sell products considered to be controversial (at least in some quarters), see, e.g., Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310-11 (2016) (reproductive health services), Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570-71 (2001) (tobacco products), City of Philadelphia v. Baretta U.S.A. Corp., 277 F.3d 415, 420-22 (3d Cir. 2002) (firearm manufacturers), or whose owners are controversial, or who are controversial because of whom they sell to or refuse to sell to or whom they employ. In 2014, the staff of the House Committee on Oversight and Government Reform observed that the Justice Department's investigation of banks and payment processors was in fact an initiative to target the legal (but politically unpopular) payday lending industry. See Staff of U.S. H.R. Comm. on Oversight and Gov't Reform, 113th Congress, The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses? (May 29, 2014), http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf. Likewise, a 2013 report from the Treasury Inspector General for Tax Administration outlines IRS agents' efforts to target "Tea Party" and other conservative groups for additional scrutiny. See, e.g., Treasury Inspector Gen. for Tax Admin., U.S. Dep't of the Treasury, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review, (May 14, 2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

It is difficult to imagine a creative prosecutor – armed with all of the resources of the federal government – not being able to find a crime to

investigate in the case of all of these types of companies under the Second Circuit's broad interpretation of the Omnibus Clause. The risk is not only theoretical. Over time, and in recent years, prosecutors have turned to the Code to find violations when faced with difficulties prosecuting (or investigating) non-tax crimes. See, e.g., Olive v. Comm'r, 139 T.C. 2 (2012) (tax collection case against medical marijuana distributor for deducting business expenses on the basis that expenses related to unlawful conduct are not deductible). It is difficult, for example, to prove that a company suspected of fraud or of money laundering has actually engaged in fraud or money laundering. How easy (and tempting) it would be, instead of engaging in the arduous process of determining that a business has engaged in such an illegal act, to investigate whether the company has preserved all records relevant to its tax returns or has taken a tax position in an area where the law is uncertain and then to charge a felony under the Omnibus Clause and put the company out of business, but not for the reason the company originally came to the government's attention. And it would not necessarily be that such a prosecutor would need to lay formal charges under the Omnibus Clause to achieve her purpose; the threat of such charges – coupled with broad and vague statutory elements – provides substantial leverage for forcing settlements or admissions, potentially even of other substantive violations.

III. The Second Circuit's Unbounded Interpretation of the Omnibus Clause Will Vastly Increase the Costs and Burdens of Tax Compliance

The Second Circuit's interpretation of the Omnibus Clause would also dramatically increase the cost of doing business for American companies. The resultant burdens would fall especially hard on small businesses, which the Small Business Administration recently estimated spends "three times more per employee on tax compliance than their largest counterparts." Small Bus. Ass'n, Frequently Asked Questions (Jan. 2011), https://www.sba.gov/sites/default/files/sbfaq.pdf.

This Court long ago observed that the Code is "highly specialized and so complex as to be the despair of judges." Dobson v. Comm'r, 320 U.S. 489, 498 (1943). In the intervening decades, the laws have become no less specialized and complex. See Jason Russell, Look At How Many Pages Are in the Federal Tax Code, Wash. Examiner, (Apr. 15, 2016), http://www.washingtonexaminer.com/look-at-how-many-pages-are-in-the-federal-tax-code/article/2563032 ("Americans are rightfully frustrated with the complexity of the 74,608-page-long federal tax code," which "is 187 times longer than it was a century ago."). As a consequence, most large businesses employ large tax departments to make sure that the company has filed and accurately completed all required forms, has transmitted the appropriate notices to its employees or independent contractors, and has maintained all necessary books and records. See KPMG, A Look Inside Tax Departments Worldwide and How They Are Evolving 3 (2016), https://assets.kpmg.com/content/dam

/kpmg/xx/pdf/2016/11/global-tax-benchmarking-survey.pdf (survey of large companies revealed, on average, that tax departments employ 16 full-time employees at headquarter location and 27 full-time employees at other locations); see also George Contos et al., IRS, Taxpayer Compliance Costs for Corporations and Partnerships: A New Look 7 (2009), https://www.irs.gov/pub/irs-soi/12rescontaxpaycompliance.pdf (estimating average income tax compliance costs in 2009 for companies with $500 million or more in assets as $471,000). The tax department will manage compliance with complex tax rules arising from managing employee benefit and retirement plans, carried business expenses, calculations of profits and earnings, and similar matters. KPMG, supra, at 3 (majority of survey respondents reported tax department responsible for "tax returns/compliance," "business unit support and consulting," "transaction taxes," "accounting for income taxes," and "transfer pricing").

But a tax department will only have at its disposal those records maintained by the company, which will likely have adopted a document retention policy that provides for the periodic destruction of documents in light of storage costs, burdens on employees' time and the ability to access information electronically, and possible litigation discovery concerns, among other considerations. Christopher V. Cotton, Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era, 24 J. Corp. L. 417, 419 (1999). And even where large organizations with sophisticated tax departments employ best practices to maintain appropriate records, some amount of human error is inevitable. Diane L.

Yetter & LeAnn Luna, The Best Practices of a Best-in-Class Corporate Tax Department, 23 J. Multistate Tax'n & Incentives 20, 48 (2013) (survey of large companies revealed that three quarters of companies "were unable to locate records required for audit because of a violation of the company's record-retention policy").

The Second Circuit's rule, if upheld by this Court, would effectively require small businesses to establish (at great cost to themselves and to the American economy) the same elaborate tax compliance structures used by the largest companies for fear that, if they do not, they run the risk of federal prosecution and a felony conviction at the hands of some overzealous prosecutor. This case illustrates the point. Petitioner was convicted of violating the Omnibus Clause for conduct that might be said to have been engaged in by numerous small businesses: failing to keep books and records, discarding documents, and failing to employ and follow the advice of a tax accountant he had consulted. Historically, such conduct would be met by a disallowance of an expense or, at most, an administrative penalty and interest. See 26 U.S.C. § 6601 (accruing interest on underpayments of tax); id. § 6662 (applying a 20% penalty to an underpayment of tax if it results from negligence or disregard of rules or regulations or is a substantial underpayment of income tax, among other circumstances). Now, as a result of the Second Circuit's opinion, such conduct can be prosecuted as a felony punishable by years in prison.

As a matter of business judgment, of course, companies might well choose to invest in elaborate and extensive tax compliance procedures. Such procedures

would decrease the chances of errors or underpayments, but even such procedures could never assure that the business would not have made one or more judgment calls that the IRS might want to challenge. 26 U.S.C. § 7203; Garvey, Inc. v. United States, 726 F.2d 1569, 1573 (Fed. Cir. 1984). But by introducing the specter of potential felony charges for doing essentially anything that makes the IRS's job more difficult, the Second Circuit's interpretation of the Omnibus Clause changes risk reduction into a required policy and would dramatically increase the cost of doing business, particularly for small businesses.

IV. The Second Circuit's Interpretation Will Also Impede Development of Tax Law by Discouraging Litigation

The danger of the Second Circuit's interpretation of the Omnibus Clause arises not only from the tool that it gives an aggressive prosecutor (after the fact) to subject an unpopular business to prison, but also from the lever that it gives the IRS (before the fact) to threaten a recalcitrant taxpayer with prosecution if the taxpayer does not acquiesce to the IRS's interpretation of the Code.

The tax law of the United States has been the product, in part, of adjudication. The Code includes a carefully balanced compilation of incentives and disincentives for a taxpayer to take a tax position that the IRS may disagree with and, if that position is challenged by the IRS, to dispute the IRS's interpretation of the law, either by paying the disputed tax amount and filing a lawsuit in federal court or by bringing an action in the Tax Court. Even where the IRS has announced a position administratively (and

thus where the government might claim that the decision not to follow that position was willful), a taxpayer has the right to take a contrary position on a tax return and force the IRS to dispute that position (even if doing so would make administration of the Code more difficult).[4] That is how law is made. See, e.g., Limited, Inc. v. Comm'r, 286 F.3d 324, 327 (6th Cir. 2002) (taxpayer's interpretation of 26 U.S.C. § 956(c) was correct, even though IRS disfavored the result; subsequently the statute was amended to "fix" the flaw the taxpayer had brought to light); Grecian Magnesite Mining, Indus. & Shipping Co. v. Comm'r, 149 T.C. No. 3 (2017) (taxpayer was correct that an IRS Revenue Ruling from 1991 was invalid, resolving a significant uncertainty in the law); Altera Corp. v. Comm'r, 145 T.C. No. 3 (2016) (taxpayer was correct that a Treasury Regulation was invalid).

The Second Circuit's interpretation of the Omnibus Clause, however, gives the IRS a potent weapon with which to challenge any taxpayer who might otherwise be bold enough to challenge an IRS interpretation. In 2016, the IRS audited more than 1.1 million corporate and individual tax returns, and determined additional tax was due with respect to 81% of the individual and 42% of the corporate returns. See IRS, Data Book 23-24 (2016), https://www.irs.gov/pub/irs-soi/16databk.pdf.

---

[4] Indeed, taxpayers are often precluded from asking a court to prospectively rule on whether an interpretation of the Code or other tax decision is correct. See, e.g., 26 U.S.C. § 7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person[.]"); 28 U.S.C. § 2201 (2012) (exclusion of various tax matters from the Declaratory Judgment Act).

In almost 30,000 of the cases where the IRS determined additional taxes were due, the taxpayer disagreed (reflecting in excess of $12.2 billion in disputed tax liability). Id. at 28. The vast majority of these matters were resolved administratively. If, however, the IRS takes a position in an audit with which the taxpayer disagrees (even if the IRS has announced a regulatory position with which the taxpayer disagrees), the taxpayer has the right to obtain a judicial interpretation of the law. There is a substantial public interest in permitting – indeed, encouraging – parties to litigate good faith tax disputes. See Mortensen v. Comm'r, 440 F.3d 375, 385 (6th Cir. 2006) ("Reasonable minds can differ over tax reporting [even when] the IRS disallows certain transactions."). But what is "good faith" can be in the mind of the beholder (and determined only after the fact and after the damage is done) and our self-assessment tax system depends upon taxpayers believing that the system is fair, that everyone is subject to the same rules, and that disagreements will be resolved by an objective judiciary. Permitting taxpayers to challenge the IRS in court also encourages the government to draft clear and unambiguous tax laws and regulations, and ensures that the IRS follows those laws, even when the IRS disfavors the result or the taxpayer.

The Second Circuit's interpretation would undermine these checks and balances. IRS rules obligate an IRS examiner who determines that a taxpayer may have engaged in tax fraud to halt a civil audit and refer the matter to the IRS Criminal Investigation Division ("CID") and, if CID determines that prosecution is warranted, CID will refer the

matter to the Department of Justice. IRS, Internal Revenue Manual § 25.1.3 (Aug. 24, 2016), https://www.irs.gov/irm/part25/irm_25-001-003r.html. Treasury regulations also delegate to CID special agents a broad authority to refer any matter within the IRS's jurisdiction to the Department of Justice for investigation and prosecution. See Treasury Order 150-35 (July 10, 2000); Delegation Order 9-6, Internal Revenue Manual § 1.2.48.7 (Feb. 6, 2013), https://www.irs.gov/irm/part1/irm_01-002-048.html.

Under the Second Circuit's interpretation of the law, even a well-intentioned IRS examiner would be well within his discretion to refer a matter for further investigation where the taxpayer has done nothing more than taken a position that the IRS thinks is incorrect or has failed to maintain documentation that the IRS would like to see. CID would then investigate whether the taxpayer acted with the requisite intent to obtain an unlawful advantage. In that circumstance, it would be an intrepid taxpayer indeed who would be willing to incur the IRS's wrath and to face an investigation and potential indictment or conviction rather than to capitulate to the IRS examiner and concede that additional tax is due, even if that tax is not, in fact, due.

It is important to note that whether or not the IRS would make a criminal referral in any given matter, or whether the Department of Justice would be able to obtain an indictment or conviction, would be largely irrelevant. The danger of the broad interpretation of the Omnibus Clause adopted below is that it will deter taxpayers from judicially challenging IRS positions, particularly on issues deemed to be of importance to

the IRS and, thus, make the IRS both lawmaker and law interpreter. See NAACP v. Button, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of rights] almost as potently as the actual application of sanctions."). Such a result would be inconsistent with the statutory structure established by Congress – which recognizes that it is ultimately the role of the courts and not the IRS to interpret the laws passed by Congress – and is not justified by congressional intent or any common-sense interpretation of the Omnibus Clause.

CONCLUSION

For the reasons set out above, *Amici* respectfully urge this Court to reverse the judgment below, and hold that the Omnibus Clause requires that a defendant have been aware of a specific IRS process and acted with the intent to obstruct or impede it.

Respectfully submitted,

U.S. CHAMBER LITIGATION CENTER
KATE COMERFORD TODD
WARREN POSTMAN
JANET GALERIA
1615 H Street, NW
Washington, D.C. 20006
(202) 463-5337

NFIB SMALL BUSINESS LEGAL CENTER
KAREN R. HARNED
ELIZABETH MILITO
1201 F Street, NW
Suite 200
Washington, D.C. 20004
(202) 406-4443

LEWIS J. LIMAN
Counsel of Record
DIANA L. WOLLMAN
NOWELL D. BAMBERGER
JONATHAN GIFFORD
ERICA KLIPPER
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
T: (212) 225-2000
F: (212) 225-3999
lliman@cgsh.com

Attorneys for Amici Curiae the Chamber of Commerce of the United States of America and the National Federation of Independent Business

Dated: September 8, 2017

RECORD AND BRIEFS

No. 16-1144

Supreme Court, U.S.
FILED
SEP - 8 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CARLO J. MARINELLO, II,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JEREMY H. TEMKIN
DANIEL F. WACHTELL
MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600
jtemkin@maglaw.com

ALEXANDRA A.E. SHAPIRO
Counsel of Record
SEAN NUTTALL
SHAPIRO ARATO LLP
500 Fifth Avenue
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Omnibus Clause Of Section 7212(a) Should Be Narrowly Construed To Avoid A Serious Constitutional Problem 4

A. The Second Circuit's Interpretation Fails To Provide Fair Notice And Would Criminalize Otherwise Innocent Conduct 5

B. The Second Circuit's Interpretation Invites Prosecutorial Abuse 9

1. The Second Circuit's Approach Enables Overcharging of Misdemeanor Conduct as a Felony 9

2. The Second Circuit's Approach Enables the Government to Bring Felony Charges in Cases Where There Is Insufficient Proof that the Defendant Committed Tax Evasion or Willfully Filed False Returns 13

TABLE OF CONTENTS
(continued)

Page

3. *The Second Circuit's Approach Enables the Government to Circumvent an Expired Statute of Limitations by Charging Disparate Acts Together as a Scheme* 17

II. The Omnibus Clause's "Corruptly" Requirement Does Not Alleviate The Vagueness Concerns . 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Achilli v. United States,
353 U.S. 373 (1957) 11

Cheek v. United States,
498 U.S. 192 (1991) 20, 21

Johnson v. United States,
135 S. Ct. 2551 (2015) 4

Kolender v. Lawson,
461 U.S. 352 (1983) 4, 5

McDonnell v. United States,
136 S. Ct. 2355 (2016) 4

Ocasio v. United States,
136 S. Ct. 1423 (2016) 24

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 5

Skilling v. United States,
561 U.S. 358 (2010) 4, 5

United States v. Aguilar,
515 U.S. 593 (1995) 2, 11

United States v. Armstrong,
974 F. Supp. 528 (E.D. Va. 1997) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Coplan,
703 F.3d 46 (2d Cir. 2012) 16

United States v. Dean,
487 F.3d 840 (11th Cir. 2007) 22

United States v. Dowell,
430 F.3d 1100 (10th Cir. 2005) 24

United States v. Field,
09-cr-581 (S.D.N.Y.) 17

United States v. Floyd,
740 F.3d 22 (1st Cir. 2014) 21

United States v. Hylton,
710 F.2d 1106 (5th Cir. 1983) 8

United States v. Jaensch,
552 F. App'x 206 (4th Cir. 2013) 22

United States v. Johnson,
571 F. App'x 205 (4th Cir. 2014) 24

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998) 21, 22

United States v. Kuball,
976 F.2d 529 (9th Cir. 1992) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Levine,
16-cr-715 (S.D.N.Y.) 18, 19

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016)..... 15, 20, 24

United States v. Marinello,
855 F.3d 455 (2d Cir. 2017) .....*passim*

United States v. Miner,
774 F.3d 336 (6th Cir. 2014) 8, 21

United States v. Nelson,
676 F. App'x 614 (8th Cir. 2017)..... 21

United States v. O'Hara,
10-cr-228 (S.D.N.Y.)..... 15

United States v. Parse,
09-cr-581 (S.D.N.Y.)..... 17

United States v. Popkin,
943 F.2d 1535 (11th Cir. 1991) 22

United States v. Reeves,
752 F.2d 995 (5th Cir. 1985) 8, 21

United States v. Rubin/Chambers, Dunhill Ins. Servs., Inc.,
09-cr-1058 (S.D.N.Y.) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Saldana,
427 F.3d 298 (5th Cir. 2005) 22, 23

United States v. Shriver,
967 F.2d 572 (11th Cir. 1992) 8

United States v. Sorenson,
801 F.3d 1217 (10th Cir. 2015) 23

United States v. Stanton,
12-cr-343, 2012 WL 5878030 (M.D. Fla.
Nov. 20, 2012) 12

United States v. Stein,
541 F.3d 130 (2d Cir. 2008) 16

United States v. Sun-Diamond Growers of Cal.,
526 U.S. 398 (1999) 25

United States v. Torim,
14-cr-238 (S.D.N.Y.) 12

United States v. Wilson,
118 F.3d 228 (4th Cir. 1997) 21, 23

United States v. Winchell,
129 F.3d 1093 (10th Cir. 1997) 21

United States v. Workinger,
90 F.3d 1409 (9th Cir. 1996) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND REGULATIONS

18 U.S.C. § 1341 13

18 U.S.C. § 1343 13

18 U.S.C. § 1344 13

26 U.S.C. § 7201 ..... 9, 13, 17, 18

26 U.S.C. § 7202 10

26 U.S.C. § 7203 ..... 9, 10, 21

26 U.S.C. § 7206 ..... 9, 13, 17, 18

26 U.S.C. § 7212 ..... *passim*

26 U.S.C. § 7215 20

OTHER AUTHORITIES

Brief of Petitioner 2, 11, 21

Brief of the American College of Tax Counsel As *Amicus Curiae* in Support of Petitioner 10

U.S. Dep't of Justice Tax Div., Crim. Tax Manual:

Gov't Proposed Jury Instr. No. 26.7212(a)-6 22

Tax Division Directive No. 129 (2004) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L.J. 255 (2009) 8

INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 300 lawyers, including many former federal and state prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. In addition, NYCDL's members (including the authors of this brief) defend many individuals and companies investigated and prosecuted for tax crimes, and thus have extensive first-hand experience with the government's use and abuse of the "Omnibus Clause" of the tax obstruction statute, 26 U.S.C. § 7212(a), particularly in the United States District Courts for the Southern and Eastern Districts of New York.

NYCDL files this *amicus* brief in support of Petitioner Carlo J. Marinello, II urging reversal.[1] NYCDL has a particular interest in this case because

---

[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any other person except for *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

NYCDL's core concerns include combatting the unwarranted extension of federal criminal statutes, promoting clear standards for the imposition of criminal liability, and deterring arbitrary enforcement by prosecutors. As shown below, the Second Circuit's overbroad interpretation of the Omnibus Clause raises precisely these concerns, as prosecutions brought in the Southern and Eastern Districts of New York highlight.

SUMMARY OF THE ARGUMENT

As Petitioner forcefully argues, the scope of the Omnibus Clause should be limited to cases in which the defendant deliberately acted to obstruct or impede some pending proceeding before the Internal Revenue Service. This interpretation is consistent with the text of the statute, its legislative history, and this Court's interpretation of other similar obstruction of justice offenses. *See* Petr.Br.23-40; *United States v. Aguilar*, 515 U.S. 593, 598-600 (1995); *United States v. Marinello*, 855 F.3d 455, 456-59 (2d Cir. 2017) (Jacobs, J., dissenting from denial of rehearing *en banc*).

This narrow construction is also necessary to avoid the constitutional problems presented by the Second Circuit's sweeping interpretation that we focus on in this *amicus* brief. This case involves a federal crime that rests on indeterminate language which, if not cabined, would fail to provide fair notice and present substantial opportunities for prosecutorial abuse. Under the Second Circuit's broad reading of the Omnibus Clause, virtually any

conduct that might make the IRS's job harder could be a felony. This would criminalize otherwise innocent activity. It would also encourage other forms of prosecutorial overreaching already common in this context, particularly in the federal courts in which *Amicus*'s members practice. For instance, the lack of any nexus requirement to pending IRS proceedings enables the government to charge a felony where (1) a person's conduct would otherwise at most constitute a mere misdemeanor, as in Marinello's case; (2) there is insufficient proof to support a felony tax offense such as tax evasion or filing a fraudulent return; or (3) criminal charges would otherwise be barred by the statute of limitations. At the same time, there is no compelling policy or law-enforcement reason supporting the Second Circuit's overbroad interpretation, because other felonies already exist to cover serious tax crimes such as evasion and filing false returns, and the Omnibus Clause plainly covers obstruction of actual pending IRS proceedings.

The Second Circuit concluded that Section 7212(a)'s "corruptly" element alleviates any due process concerns, but in practice that element does not provide a meaningful check on prosecutorial overreach. In contrast to the "willfulness" element in other federal tax offenses, the standard instruction on "corruptly" does not require proof of the defendant's knowledge of unlawfulness. Thus, in cases like this one, where a misdemeanor can be proved, "corruptly" adds no additional burden. And in cases involving entirely innocent conduct by defendants with no awareness of any illegality, the "corruptly" element is no bar to a felony charge under the Omnibus Clause.

This Court should adopt a limiting construction to avoid the serious constitutional problems inherent in dispensing with the nexus requirement that should be an element of the Omnibus Clause offense, as it has done in other similar recent cases. *See, e.g., Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

ARGUMENT

I. The Omnibus Clause Of Section 7212(a) Should Be Narrowly Construed To Avoid A Serious Constitutional Problem

As this Court has repeatedly held, it is a violation of the Due Process Clause to "tak[e] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *see also, e.g., Skilling*, 561 U.S. at 402-03.

The vagueness doctrine has two complementary purposes. First, it ensures that penal statutes have "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402 (internal quotation marks omitted). Second, the doctrine is intended to avoid a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358

(internal quotation marks omitted); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (same).

As construed by the Second Circuit, the Omnibus Clause implicates both of these constitutional concerns. To avoid ending up on this "vagueness shoal," *Skilling*, 561 U.S. at 368, the provision should be cabined to corrupt endeavors to intentionally obstruct or impede a pending IRS proceeding.

A. The Second Circuit's Interpretation Fails To Provide Fair Notice And Would Criminalize Otherwise Innocent Conduct

By divorcing criminal liability from the requirement of an ongoing proceeding, the Second Circuit's interpretation of the Omnibus Clause lacks fair notice and threatens to criminalize otherwise innocent activity. In particular, it gives the government broad leeway to charge taxpayers who engaged in entirely legal conduct that happens to make the IRS's job harder.

It is easy to envision taxpayers unwittingly violating the Second Circuit's interpretation of Section 7212(a) through entirely lawful conduct. For example, assume a taxpayer filed complete, accurate, and timely returns over the period of many years, but regularly destroyed her business records due to space constraints (*i.e.*, for reasons having nothing to do with a desire to impede the IRS). Were the IRS to

commence an audit, it could readily argue that the taxpayer's document retention practices, which long predated the audit, impaired its ability to conduct the audit, regardless of whether any improper tax reporting was ultimately found. The same would be true in the case of a taxpayer who maintained sloppy books or a complex (but legal) corporate structure. Because the IRS likely will be skeptical that the taxpayer's destruction of records, sloppy recordkeeping, or chosen corporate structure was not intended to conceal unreported income or improper deductions, this innocuous conduct could easily lead to criminal prosecution and its accompanying stigma and economic cost.

The Second Circuit's approach would allow the government to charge such taxpayers under the second prong of Section 7212(a) for entirely legitimate conduct in a scenario where no other tax charge could be brought at all. This would place the burden on the taxpayer to stand trial and rely on a jury to acquit her on a finding that she lacked the requisite *mens rea* to be said to have acted "corruptly." However, as Judge Jacobs correctly pointed out in his dissent from the Second Circuit's denial of rehearing *en banc* below, "[taking] comfort in the mens rea requirement that the act or acts be done 'corruptly' . . . is surely an illusion," as "*alleging* a corrupt motive is no burden at all" to the prosecution, and the mere fact of being charged in a federal criminal proceeding can be destructive to a defendant's life. 855 F.3d at 457. Indeed, as explained *infra* in Point II, in many circuits conduct can be corrupt even if the defendant is unaware that it is unlawful.

Significantly, the government's decision to charge Marinello appears to fall afoul of the Department of Justice Tax Division's own guidance. This guidance recognizes that charges under Section 7212(a) are "particularly appropriate" for conduct that impedes an IRS proceeding. U.S. Dep't of Justice Tax Div., Crim. Tax Manual § 3.00, Tax Division Directive No. 129 (2004), *available at* www.justice.gov/sites/default/files/tax/legacy/2014/08/05/CTM%20Chapter%203.pdf. Absent an ongoing IRS proceeding, charges under Section 7212(a) may be appropriate where individuals have "engaged in large-scale obstructive conduct involving the tax liability of third parties." However, the only example provided of such conduct is "assisting in preparing or filing a large number of fraudulent returns or other tax forms." The directive also indicates that the Omnibus Clause "should not be used as a substitute for a charge directly related to tax liability – such as tax evasion or filing a false tax return – if such a charge is readily provable." *Id.* at 1. In other words, had the Department of Justice followed its own directive, it would not have prosecuted Marinello under the Omnibus Clause. That the government chose to ignore its own guidance only underscores the need for the courts to more clearly demarcate the statute's boundaries.

Nor is *Marinello* the only case that raises the specter of the criminalization of otherwise legal conduct. At least two circuits have stated that Section 7212(a) "is aimed at prohibiting efforts to impede," *inter alia*, "the auditing of one's or another's tax records." *United States v. Kuball*, 976 F.2d 529, 531

(9th Cir. 1992) (quoting *United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985)). Yet "audit avoidance planning," the structuring and reporting of a transaction to minimize the likelihood of audit, is both commonplace and otherwise legal. *See generally* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L.J. 255 (2009) (discussing audit avoidance planning and Section 7212(a)). Similarly, other cases suggest that otherwise legal asset transfers may be deemed an effort to impede tax collection. For instance, in *United States v. Shriver*, 967 F.2d 572, 573 (11th Cir. 1992), Section 7212(a) charges were predicated in part on the defendant's transferring title to his property before the IRS filed a tax lien against it. And yet other cases raise the possibility that the government may even use Section 7212(a) to deter conduct protected under the First Amendment. *See, e.g.*, *United States v. Hylton*, 710 F.2d 1106, 1107-08 (5th Cir. 1983) (involving Section 7212(a) charges for filing a trespass complaint against IRS agents who entered defendant's property without permission).[2] Under this sweeping interpretation of the scope of Section 7212(a), a vast swath of conduct that individuals might reasonably view as entirely legitimate risks attracting felony charges.

---

[2] Although the Fifth Circuit affirmed the vacatur of defendant's conviction on First Amendment grounds, its decision standing alone does not ensure that other similarly-situated individuals will not be prosecuted in future. *Cf. United States v. Miner*, 774 F.3d 336, 339-42 (6th Cir. 2014) (involving Section 7212(a) charges for, *inter alia*, filing Freedom of Information Act and Privacy Act requests for IRS files).

B. The Second Circuit's Interpretation Invites Prosecutorial Abuse

By enlarging the scope of Section 7212(a), the Second Circuit's approach also invites prosecutorial abuse in the investigative, charging, and plea-negotiation phases of tax cases. In our experience representing clients under investigation for tax-related offenses – or, as is often the case, clients under investigation in the first instance for non-tax-related offenses – we have seen firsthand the unfairness that this approach can cause. The Second Circuit's interpretation of the Omnibus Clause enables prosecutors to charge (or threaten to charge) otherwise innocent activity. It also enables the government to bring (1) felony charges where the taxpayer's conduct would otherwise constitute a mere misdemeanor under 26 U.S.C. § 7203; (2) felony charges where there is insufficient proof to support a felony prosecution under 26 U.S.C. §§ 7201, 7206(1), or 7206(2); or (3) tax charges where all tax-related misconduct would otherwise be barred by the statute of limitations.

1. The Second Circuit's Approach Enables Overcharging of Misdemeanor Conduct as a Felony

As *amicus curiae* American College of Tax Counsel stated in its brief in support of the petition for a writ of certiorari, "[t]he tax enforcement system enacted by Congress and interpreted by the courts creates predictable and comprehensible distinctions between lawful conduct, misdemeanors, and felonies."

ACTC.Cert.Br.6. In implementing Title 26, Congress sought to distinguish between acts of commission, which could be charged as felonies, and failures to act, which were deemed to merit misdemeanor charges. With the exception of two well-defined and limited situations involving taxpayers performing special roles, neither of which applies in this case or the overwhelming majority of Section 7212(a) cases, tax felonies require willful commission of an affirmative act. By contrast, the willful *failure* to act leads only to misdemeanor liability under Section 7203, which criminalizes the failures to file, pay tax due and owing, keep proper records, and provide required information.[3]

The Second Circuit's interpretation of Section 7212(a) eviscerates the lines that Congress has drawn. By enabling omissions – misdemeanor conduct – to be prosecuted as felonies, the Second Circuit's interpretation upends the statutory scheme and violates the proper separation of powers between the legislative and executive branches of government. It creates abundant unpredictability and a lack of fair notice for taxpayers and permits prosecutors (and IRS agents) to claim the "success" of a felony resolution where the defendant's conduct most clearly violated a misdemeanor statute. As Petitioner explains, this

---

[3] The only two willful *failures* to act that Congress chose to treat as felonies rather than misdemeanors are the willful failure of a withholding agent to collect, account for, and pay over tax (a felony under 26 U.S.C. § 7202) and the willful failure of a person engaged in a trade or business to comply with currency transaction reporting requirements (a felony under 26 U.S.C. § 7203).

approach enables the government to charge felonies without having "to prove the more demanding elements that Congress required of other key tax felonies," and in so doing fails to read Section 7212(a) in such a way as "to harmonize rather than conflict with, supersede, or be redundant of other provisions." Petr.Br.40-41 (citing *Aguilar*, 515 U.S. at 600; *Achilli v. United States*, 353 U.S. 373, 378-79 (1957)).

Indeed, this case is an unfortunate example of what can happen when prosecutors decide, for whatever reason, that a misdemeanor resolution is insufficient. Although Marinello was investigated for felony tax crimes, there was insufficient evidence to file those charges. Instead he was charged with, and convicted of, eight misdemeanors for his failure to file individual and corporation tax returns. These charges exposed him to eight years in prison, but the sentencing judge deemed concurrent one-year sentences sufficient punishment for these offenses. Adding the Section 7212(a) count not only inflated the taxpayer's misdemeanor misconduct to a felony, with all the associated collateral consequences and incremental stigma, but apparently led the sentencing judge also to *triple* the sentence to a three-year term. Congress plainly did not intend such a result in cases where the taxpayer has taken no affirmative steps to obstruct an audit or other pending proceeding.

A review of cases filed in the United States District Courts for the Southern and Eastern Districts of New York reveals that *Marinello* is not

unique in this regard.[4] For instance, in *United States v. Torim*, 14-cr-238 (S.D.N.Y.), the defendant was charged with five misdemeanor counts of failure to file his individual income tax returns. The indictment also charged a single count of impeding the IRS in violation of Section 7212(a), even though there was no allegation that Torim made any effort to obstruct any pending IRS proceeding. Instead, the 7212(a) charge was based upon Torim's efforts to conceal his income by a variety of means such as shell companies and nominees, as well as his failure to file tax returns. Dkt. No. 2, Indictment, at 3 (Apr. 10, 2014).

As in Petitioner's case, the government was unable to prove any tax felony. It initially contended that the defendant owed $385,000 in unpaid taxes, but by the time of sentencing, had conceded that there was no tax loss. Thus, despite the absence of evidence that he willfully evaded his income tax obligations or otherwise engaged in criminal misconduct beyond failing to file returns, Torim pled guilty to a felony. The precise reason why he agreed to a felony resolution cannot be known with certainty. But it is at least apparent that, in cases like those of Torim and Marinello, the government's ability to use Section 7212(a) to bring a felony charge for misdemeanor

---

[4] Nor is this practice limited to the Southern and Eastern Districts of New York. *See, e.g., United States v. Stanton*, 12-cr-343, 2012 WL 5878030, at *1 (M.D. Fla. Nov. 20, 2012) (Section 7212(a) charges based on defendant's failure to file tax returns); *United States v. Armstrong*, 974 F. Supp. 528, 586 n.14 (E.D. Va. 1997) (suggesting that 7212(a) charges are appropriate if individual fails to file tax returns or forms).

conduct is a powerful weapon in the prosecutorial arsenal – but one that is contemplated neither by the language or intent of the Omnibus Clause nor by the guidance offered in the Tax Division's directive.[5]

2. The Second Circuit's Approach Enables the Government to Bring Felony Charges in Cases Where There Is Insufficient Proof that the Defendant Committed Tax Evasion or Willfully Filed False Returns

In cases such as *Marinello* and *Torim*, the Second Circuit's expansive reading of Section 7212(a) also affords the government the ability to charge (or threaten to charge) a felony tax offense notwithstanding evidentiary problems that effectively preclude a prosecution under Sections 7201 or 7206. An individual under criminal investigation should be able to find comfort in the knowledge that the investigation either will or will not turn up sufficient evidence to warrant felony charges, and that she will not be branded a felon if she did not engage in tax evasion, file false returns, or obstruct an ongoing audit or investigation.

---

[5] To be sure, in cases where the defendant has engaged in affirmative misconduct that is not a tax crime but that falls under another criminal statute, such as making a false statement to a bank or other (non-IRS) person to hide his income, the government may employ other tools in its arsenal, such as mail, wire, and bank fraud. *See* 18 U.S.C. §§ 1341, 1343, 1344. But in such cases the government should not also be allowed to charge an overbroad tax felony intended only to cover obstruction of the IRS.

An overexpansive reading of Section 7212(a), however, gives the government a toehold that it should not have – a way of charging a defendant with a tax felony despite the absence of proof that he willfully evaded his tax obligations, willfully filed false returns, or engaged in obstructive conduct. This is not an empty possibility: As our experience has shown, it is human nature for prosecutors and IRS agents to want to conclude a lengthy investigation – as many tax investigations are – with a weighty conviction. Additionally, the adversarial nature of the audit and investigative processes can often create significant animosity between even innocent (if sloppy) taxpayers and the investigating agents. This unfortunate but unavoidable dynamic creates further incentives for the agents to advocate for felony charges notwithstanding problems of proof, *de minimis* tax loss, or (as discussed separately below) concerns regarding the applicable statute of limitations.[6]

---

[6] Section 7212(a) is also regularly charged in cases where the underlying investigation was conducted by IRS agents working in conjunction with other law enforcement agencies. Based on our experience, if such investigations uncover evidence of significant non-tax related misconduct, the IRS agents may push the prosecutors to include tax charges to enable them to obtain statistical credit for their work. While a charge under Section 7212(a) may enable the prosecutor to satisfy the agents' internal political goals (and thereby ensure the agents' availability to work on the next investigation), this is hardly a valid or just use of the power to charge citizens with criminal offenses. *See, e.g.*, *United States v. Rubin/Chambers, Dunhill Ins. Servs., Inc.*, 09-cr-1058 (S.D.N.Y.) (charging individual defendants under § 7212(a) in addition to antitrust and wire fraud statutes in case

Thus, in the instant case, the IRS initially audited and investigated Marinello and his business based on "an anonymous letter purporting to outline some of Marinello's business practices and accusing him of tax evasion." *United States v. Marinello*, 839 F.3d 209, 212 (2d Cir. 2016). The investigating agent likely believed that she would find either that Marinello had willfully evaded his tax obligations or, at a minimum, had intentionally underreported his income. As the opinion below recounts, however, the IRS was never able to "determine whether the unreported income was significant" – in other words, whether a felony charge was viable. *Id.* Marinello subsequently became aware of the IRS investigation and, in an interview with the same agent, admitted failing to file returns, destroying records, and having sloppy bookkeeping practices. *Id.*

There was no suggestion that Marinello engaged in obstructive conduct after becoming aware of the IRS's investigation. Nonetheless, by invoking the Omnibus Clause, the government was able to bring a felony charge that otherwise would have been untenable. From the perspective of the investigating agents and the prosecutorial team, this result was undoubtedly more desirable and successful than a mere misdemeanor resolution would have been. From the perspective of Marinello and similarly-

---

centering on scheme to manipulate market for municipal bond investments); *United States v. O'Hara*, 10-cr-228 (S.D.N.Y.) (charging employees of Bernard L. Madoff Investment Securities LLC with violation of § 7212(a) in addition to violations of securities fraud statutes).

situated taxpayers, there is no predictability to a process where an individual may successfully defend against a multi-year government investigation into whether he had willfully evaded his tax obligations or filed materially false returns, only subsequently to learn of the government's intention to redirect its focus onto charging an inherently vaguer, less-focused offense.

Similar unfairness can result when Section 7212(a) is used to pile onto weak or deficient cases against defendants charged with crimes involving third parties' tax returns. *Amicus*'s members have defended such cases in recent years in the Southern District of New York, where for over a decade the government aggressively pursued criminal charges related to tax shelters designed and promoted by some of the country's largest and most prestigious law and accounting firms – only to have many of the cases reversed on appeal or dismissed by the district court.[7] As relevant here, in one multi-defendant case involving tax shelters marketed by the law firm Jenkins & Gilchrist, the government charged two defendants with having violated Section 7212(a) even though neither was in any way involved with IRS audits related to the tax shelters. While these defendants – a broker who executed securities transactions for tax shelter clients at the direction of the lawyers who designed the shelters, and an accounting firm CEO who was uninvolved in the

---

[7] *See, e.g., United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012); *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

firm's work for tax shelter clients – were ultimately vindicated, each was forced to endure years of investigations, trials and other proceedings, and unwarranted and largely irreparable reputational damage. *See United States v. Parse*, 09-cr-581 (S.D.N.Y.); *United States v. Field*, 09-cr-581 (S.D.N.Y.). As these cases illustrate, the potential for prosecutorial abuse from an overbroad reading of the Omnibus Clause also risks exposing financial professionals to felony tax prosecutions even if they engage in no obstructive conduct and are otherwise innocent of tax crimes.

3. The Second Circuit's Approach Enables the Government to Circumvent an Expired Statute of Limitations by Charging Disparate Acts Together as a Scheme

Lastly, the Second Circuit's expansive reading of the Omnibus Clause allows the government to impose felony liability on taxpayers where the statute of limitations would otherwise bar prosecution. For instance, assume a hypothetical taxpayer who regularly destroyed records for reasons having nothing to do with the IRS. If this taxpayer had filed inaccurate returns through 2009, but thereafter had filed accurate and timely returns, by 2015 any charges under Section 7201 or 7206 would be time-barred. The government could nonetheless still threaten to bring charges under Section 7212(a) even though the taxpayer had engaged only in legal conduct during the statutory period – albeit conduct that, by its nature, may have complicated the IRS's job of auditing the taxpayer's non-time-barred

returns – thereby undermining the repose to which the taxpayer is statutorily entitled.

The Omnibus Clause also could be used to charge in a single count both time-barred felony conduct and more recent conduct that the government otherwise would not (or could not) charge as a felony. Take for instance a taxpayer who, for many years, failed to file accurate Schedules E reflecting income and expenses associated with rental real estate properties. If the real estate business operated at a material profit only in time-barred years, but had operated at a loss during the open years, the government would be unable to charge the taxpayer under Section 7201, and would be unlikely to charge a violation of Section 7206(1) since the recent losses that would have been reflected on accurate Schedules E would not have resulted in any unreported income on the taxpayer's Forms 1040 or incremental tax due and owing.[8] By using Section 7212(a), however, the government could allege that the entire pattern of conduct was part of the scheme to obstruct the enforcement of Title 26, thereby circumventing the statute of limitations problem that would otherwise exist.

Similarly, in a recently indicted case, *United States v. Levine*, 16-cr-715 (S.D.N.Y.), the government dodged a valid statute of limitations defense to tax

---

[8] While filing a false Schedule E can constitute a violation of Section 7206(1), in the experience of *amicus*, the government rarely, if ever, brings charges under Section 7206(1) in the absence of some unreported income.

evasion conduct by alleging that it was part of a scheme to impede the IRS. In his pretrial motion to dismiss, Levine contended that the mere fact that he allegedly evaded taxes in multiple consecutive years – some time-barred, others not – was not itself indicative of a scheme to impede the IRS, as there was no unifying mechanism upon which the various evasions depended (such as a tax shelter, or a related fraud). Nor did one year's false filing depend upon, or benefit from, the next year's (nor vice versa). Rather, Levine argued, it simply happened to be the case that in each successive year, he allegedly evaded taxation. Levine also contended that other conduct charged as part of the 7212(a) scheme – conduct that fell within the statute of limitations, such as certain tax-credit transactions, or an alleged fraud on the defendant's employer – could not "possibly be found to support the [time-barred] scheme alleged," and that the government had improperly charged the conduct together only in order to overcome a limitations bar that otherwise could not be avoided. The District Court denied the motion, however, permitting the government to skirt this obstacle.[9]

---

[9] The District Court denied Levine's motion for failing to accept as true the allegations in the Indictment, and thus seeking "to have the Court decide various disputes about the substantive merits" of the Section 7212(a) count at the motion to dismiss stage. Dkt. No. 29, Opinion & Order, at 7 (Apr. 12, 2017). Shortly thereafter, Levine changed his plea from not guilty to guilty; he currently awaits sentencing.

II. The Omnibus Clause's "Corruptly" Requirement Does Not Alleviate The Vagueness Concerns

Notwithstanding these serious issues of lack of fair notice and potential for prosecutorial abuse raised by its interpretation of Section 7212(a), the Second Circuit dismissed Marinello's vagueness argument because it was satisfied that the "corruptly" "*mens rea* requirement sufficiently restricts the omnibus clause's reach." 839 F.3d at 222 (internal quotations omitted). But as Judge Jacobs persuasively argued in his dissent from the denial of *en banc* rehearing, "*alleging* a corrupt motive is no burden at all." 855 F.3d at 457.

This is true whether or not the defendant happens to be guilty of a tax misdemeanor. It is much easier for the government to prove a "corrupt" intent than the "willfulness" it must prove for other tax offenses. Under Title 26, misdemeanor and felony liability generally require willfulness, the highest level of scienter.[10] The "standard for th[is] statutory willfulness requirement is the voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991) (internal quotation marks omitted). This requires proof "that the law imposed a duty on the defendant, that [he] knew of

---

[10] The sole inapposite exception is 26 U.S.C. § 7215, which imposes liability for continued failure to collect and pay over withholding tax after receipt of hand-delivered notification of failure to do so and does not require willfulness.

this duty, and that he voluntarily and intentionally violated that duty." *Id.*[11]

Accordingly, as Petitioner explains, if there is sufficient proof to charge a misdemeanor failure to file under Section 7203, then the government will already have undertaken the burden of establishing that the defendant acted "willfully"—*i.e.*, that he knew but deliberately disregarded his legal duty to file a return, pay the tax, keep required records, or provide information. In such a case, requiring the government to establish that the defendant acted "corruptly" will impose no additional *mens rea* burden. *See* Petr.Br.42-43, 52-53.

And, if the defendant has not committed any tax misdemeanor, "corruptly" provides a fairly toothless limitation on the scope of the Omnibus Clause. Indeed, it is not much of a "*mens rea* requirement" at all. Every circuit to have addressed the question has defined acting "corruptly" under Section 7212(a) as acting with intent to gain an unlawful advantage or benefit either for oneself or for another. *See United States v. Floyd*, 740 F.3d 22, 31 (1st Cir. 2014); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997); *Reeves*, 752 F.2d at 1001; *Miner*, 774 F.3d at 343; *United States v. Nelson*, 676 F. App'x 614, 616 (8th Cir. 2017); *United States v. Workinger*, 90 F.3d 1409, 1414 (9th Cir. 1996); *United States v. Winchell*, 129 F.3d 1093, 1098 (10th Cir.

[11] Non-willful violations of the provisions of the tax code generally subject taxpayers only to civil, not criminal, liability.

1997); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991).

This language does not expressly require the defendant even to *know* that the benefit he sought was unlawful, and most circuits have imposed no such knowledge requirement.[12] The Department of Justice's own guidance also omits knowledge of unlawfulness from its burden of proof. The proposed jury instructions on Section 7212 set out in the Department of Justice's Criminal Tax Manual define "corruptly" merely as "act[ing] with the intent to secure an unlawful advantage or benefit." *See* U.S. Dep't of Justice Tax Div., Crim. Tax Manual, Gov't Proposed Jury Instr. No. 26.7212(a)-6, *available at* www.justice.gov/sites/default/files/tax/legacy/2013/02/26/CTM%20JI%20-%20Title%2026.pdf.

Consequently, as a practical matter the purported limitation of requiring "corrupt" intent is not a meaningful circumscription. Rather, it appears to be satisfied whenever the defendant intended to gain an advantage for himself or someone else – so long as that benefit happens to be unlawful,

---

[12] A few circuits using this formulation have said that the defendant must act "with the specific intent to secure an unlawful benefit." *United States v. Jaensch*, 552 F. App'x 206, 210 (4th Cir. 2013); *accord United States v. Dean*, 487 F.3d 840, 853 (11th Cir. 2007); *United States v. Saldana*, 427 F.3d 298, 303 (5th Cir. 2005); *cf. Kelly*, 147 F.3d at 176-77 (declining to read willfulness requirement into § 7212(a) since jury instruction containing standard definition of "corruptly" "was as comprehensive and accurate as if the word 'willfully' was incorporated in the statute"). But most have not imposed any such limitation.

irrespective of whether the defendant knew that or not.

For instance, suppose a taxpayer participates in a tax shelter that he believes is a legitimate way to take advantage of a loophole in the tax code. The taxpayer does not violate any disclosure requirements, but the tax shelter involves a series of complex financial transactions that make it hard for the IRS to detect or investigate the details. Under the prevailing interpretation of "corruptly," if the government persuaded a jury that the tax shelter did not comply with the Internal Revenue Code, then the taxpayer could be convicted of violating the Omnibus Clause. Yet because the taxpayer in this hypothetical had an objectively reasonable belief of the shelter's legality, he did not engage in tax evasion or tax fraud. In this scenario, the Omnibus Clause would create criminal exposure for entirely innocent conduct.

Indeed, even legal acts or omissions violate Section 7212(a) if performed with the intent to obtain an unlawful benefit, *see, e.g.*, *Wilson*, 118 F.3d at 234, and this benefit need not be tax-related, *see, e.g.*, *Saldana*, 427 F.3d at 305. Moreover, under Section 7212(a), "obstructing" or "impeding" could include almost anything. *See United States v. Sorenson*, 801 F.3d 1217, 1229 (10th Cir. 2015) (upholding jury instruction that "[t]o 'obstruct or impede' is to hinder or prevent from progress; to slow or stop progress; or to make accomplishment difficult and slow"). And the Omnibus Clause covers not only actual obstruction or impediment of the due administration of the Internal Revenue laws, but also "endeavoring" to do so, which

the courts similarly have defined extremely broadly. *See United States v. Johnson*, 571 F. App'x 205, 209 (4th Cir. 2014) (jury instructed that "[a]n endeavor is any effort or any act or attempt to effectuate an arrangement or to try to do something, the natural and probable consequences of which is to obstruct or impede the due administration of the Internal Revenue laws"); *United States v. Dowell*, 430 F.3d 1100, 1110 (10th Cir. 2005) (jury instructed that "[t]he endeavor need not be successful, but it must at least have had a reasonable tendency to obstruct or impede the due administration of the Internal Revenue laws"). In the Second Circuit's view, "endeavor" even extends to an omission or failure to act. *See Marinello*, 839 F.3d at 224-25.

* * *

There is no meaningful limitation on the Omnibus Clause's scope if, as the Second Circuit concluded, the Clause covers conduct that simply makes the IRS's job harder, irrespective of whether that conduct was intended to obstruct a proceeding pending before the IRS. The potential for prosecutorial abuse of the Omnibus Clause is not limited to the threat of conviction, but extends to the threat of abusive investigation and charging decisions, which are particularly acute in this context, as explained above. The Second Circuit's decision invites prosecutors to abuse their power and risks exactly the discriminatory enforcement that the vagueness doctrine is designed to prevent, "raising the specter of potentially charging everybody . . . and seeing what sticks and who flips." *Ocasio v. United*

States, 136 S. Ct. 1423, 1445 (2016) (Sotomayor, J., dissenting). As Judge Jacobs aptly observed in his dissent from the denial of rehearing *en banc*: "How easy it is under the [Second Circuit's interpretation] for an overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*." 855 F.3d at 457.

At best for the government, the Omnibus Clause is a provision "that can linguistically be interpreted to be either a meat axe or a scalpel." *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). In keeping with principles of due process and lenity, it "should reasonably be taken to be the latter," *id.*, and thus limited in scope to corrupt endeavors to obstruct a pending IRS proceeding.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JEREMY H. TEMKIN
DANIEL F. WACHTELL
MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600
jtemkin@maglaw.com

ALEXANDRA A.E. SHAPIRO
Counsel of Record
SEAN NUTTALL
SHAPIRO ARATO LLP
500 Fifth Avenue
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Amicus Curiae

September 8, 2017